DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-553
Title: Hosanna-Tabor Evangelical Lutheran Church and School, Petitioner
v.
Equal Employment Opportunity Commission, et al.
Docketed: October 26, 2010
Linked with 10A235
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (09-1134, 09-1135)
Decision Date: March 9, 2010
Rehearing Denied: June 24, 2010
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Sep 1 2010	Application (10A235) to extend the time to file a petition for a writ of certiorari from September 22, 2010 to October 22, 2010, submitted to Justice Thomas.
Sep 2 2010	Application (10A235) granted by Justice Thomas extending the time to file until October 22, 2010.
Oct 22 2010	Petition for a writ of certiorari filed. (Response due November 26, 2010)
Nov 16 2010	Order extending time to file response to petition to and including December 27, 2010, for all respondents.
Nov 24 2010	Motion for leave to file amici brief filed by International Mission Board of the Southern Baptist Convention, et al.
Nov 24 2010	Motion for leave to file amici brief filed by Religious Organizations and Institutions.
Nov 24 2010	Motion for leave to file amici brief filed by Christian Reformed Church in North America, et al.
Dec 13 2010	Order further extending time to file response to petition to and including January 26, 2011, for all respondents.
Jan 26 2011	Brief of respondent Equal Employment Opportunity Commission in opposition filed.
Jan 26 2011	Brief of respondent Cheryl Perich in opposition filed.
Feb 8 2011	Reply of petitioner Hosanna-Tabor Evangelical Lutheran Church and School filed. Distributed). TBP
Feb 9 2011	DISTRIBUTED for Conference of February 25, 2011.
Feb 28 2011	DISTRIBUTED for Conference of March 4, 2011.
Mar 10 2011	DISTRIBUTED for Conference of March 18, 2011.
Mar 21 2011	DISTRIBUTED for Conference of March 25, 2011.
Mar 28 2011	Motion for leave to file amici brief filed by International Mission Board of the Southern Baptist Convention, et al. GRANTED.

Mar 28 2011	Motion for leave to file amici brief filed by Religious Organizations and Institutions GRANTED.
Mar 28 2011	Motion for leave to file amici brief filed by Christian Reformed Church in North America, et al. GRANTED.
Mar 28 2011	Petition GRANTED.
Apr 6 2011	The time to file the joint appendix and petitioner's brief on the merits is extended to and including June 13, 2011.
Apr 6 2011	The time to file respondents' briefs on the merits is extended to and including August 2, 2011.
May 3 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
May 6 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent Cheryl Perich.
Jun 13 2011	Joint appendix filed. (Statement of costs received)
Jun 13 2011	Brief of petitioner Hosanna-Tabor Evangelical Lutheran Church and School filed.
Jun 17 2011	Consent to the filing of amicus briefs, in support of either party or of neither party, received from the Solicitor General on behalf of the EEOC.
Jun 20 2011	Brief amicus curiae of The Rutherford Institute filed.
Jun 20 2011	Brief amici curiae of Jewish Educational Center, et al. filed.
Jun 20 2011	Brief amicus curiae of International Center for Law and Religion Studies at Brigham Young University filed.
Jun 20 2011	Brief amici curiae of the Evangelical Covenant Church, et al. filed.
Jun 20 2011	Brief amicus curiae of the Lutheran Church - Missouri Synod filed.
Jun 20 2011	Brief amici curiae of Muslim-American Public Affairs Council, et al. filed.
Jun 20 2011	Brief amici curiae of American Jewish Committee and the Union for Reform Judaism filed.
Jun 20 2011	Brief amici curiae of United States Conference of Catholic Bishops, et al. filed.
Jun 20 2011	Brief amicus curiae of Justice and Freedom Fund filed.
Jun 20 2011	Brief amicus curiae of American Association of Christian Schools filed.
Jun 20 2011	Brief amici curiae of International Mission Board of the Southern Baptist Convention, et al. filed.
Jun 20 2011	Brief amicus curiae of American Center for Law and Justice and Intervarsity Christian Fellowship/USA filed.
Jun 20 2011	Brief amici curiae of Religious Tribunal Experts filed.
Jun 20 2011	Brief amici curiae of Professor Eugene Volokh, et al. filed.
Jun 20 2011	Brief amici curiae of Michigan, et al. filed.
Jun 20 2011	Brief amicus curiae of Council for Christian Colleges and Universities filed.
Jun 20 2011	Brief amicus curiae of National Jewish Commission on Law and Public Affairs filed.
Jun 20 2011	Brief amici curiae of Religious Organizations and Institutions filed.
Jun 20 2011	Brief amici curiae of American Bible Society, et al. filed.
Jun 20 2011	Brief amicus curiae of Trinity Baptist Church of Jacksonville, Inc. filed.
Jun 20 2011	Brief amicus curiae of Wallbuilders, Inc. filed.
Jul 15 2011	CIRCULATED.
Jul 19 2011	SET FOR ARGUMENT ON Wednesday, October 5, 2011.

Aug 2 2011	Brief of respondent Equal Employment Opportunity Commission filed. (Distributed)
Aug 2 2011	Brief of respondent Cheryl Perich filed. (Distributed)
Aug 5 2011	Motion for divided argument filed by the Solicitor General.
Aug 8 2011	Brief amici curiae of American Humanist Association and American Atheists, Inc., et al. filed. (Distributed)
Aug 8 2011	Brief amicus curiae of Neil H. Cogan filed. (Distributed)
Aug 9 2011	Brief amici curiae of Law and Religion Professors filed. (Distributed)
Aug 9 2011	Brief amici curiae of BishopAccountability.org, et al. filed. (Distributed)
Aug 9 2011	Brief amicus curiae of Antitrust Professors and Scholars filed. (Distributed)
Aug 9 2011	Brief amicus curiae of People For the American Way Foundation filed. (Distributed)
Aug 9 2011	Brief amicus curiae of Anti-Defamation League filed. (Distributed)
Aug 9 2011	Brief amici curiae of NAACP Legal Defense Fund, et al. filed. (Distributed)
Aug 9 2011	Brief amici curiae of Americans United for Separation of Church and State, et al. filed. (Distributed)
Aug 9 2011	Brief amicus curiae of National Employment Lawyers Association filed. (Distributed)
Aug 10 2011	Record from U.S.C.A. for 6th Circuit is electronic.
Aug 11 2011	Record from U.S.D.C. for Eastern District of Michigan is electronic.
Aug 18 2011	Application (11A219) of petitioner to file a reply brief on the merits in excess of the word limit, submitted to Justice Kagan.
Aug 24 2011	Application (11A219) granted by Justice Kagan to file a reply brief on the merits in excess of the word limit.
Sep 1 2011	Reply of petitioner Hosanna-Tabor Evangelical Lutheran Church and School filed. (Distributed)
Sep 27 2011	Motion for divided argument filed by the Solicitor General GRANTED.
Oct 5 2011	Argued. For petitioners: Douglas Laycock, Charlottesville, Va. For federal respondent: Leondara R. Kruger, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For private respondent: Walter Dellinger, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
OCT 22 2010
OFFICE OF THE CLERK

No. 10-

In the Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal courts of appeals have long recognized the "ministerial exception," a First Amendment doctrine that bars most employment-related lawsuits brought against religious organizations by employees performing religious functions. The circuits are in complete agreement about the core applications of this doctrine to pastors, priests, and rabbis. But they are evenly divided over the boundaries of the ministerial exception when applied to other employees. The question presented is:

Whether the ministerial exception applies to a teacher at a religious elementary school who teaches the full secular curriculum, but also teaches daily religion classes, is a commissioned minister, and regularly leads students in prayer and worship.

PARTIES TO THE PROCEEDINGS

Petitioner Hosanna-Tabor Evangelical Lutheran Church and School was the defendant-appellee below. Respondent Equal Employment Opportunity Commission was the plaintiff-appellant below, and respondent Cheryl Perich was the intervenor-plaintiff-appellant below. Petitioner Hosanna-Tabor Evangelical Lutheran Church and School has no parent corporation and issues no stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Hosanna-Tabor Evangelical Lutheran Church and School respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1a-30a) is published at 597 F.3d 769. The district court's opinion (Pet. App. 31a-53a) is published at 582 F. Supp. 2d 881. The district court's opinion denying the motion for reconsideration (Pet. App. 54a-61a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 2010. The court denied rehearing on June 24, 2010. Pet. App. 62a-63a. On September 2, 2010, Justice Thomas extended the time within which to file this petition to and including October 22, 2010. App. No. 10A235. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The relevant statutory provisions are reproduced in the appendix to this petition. Pet. App. 64a-66a.

STATEMENT

This petition arises from an employment discrimination lawsuit brought against a church-owned school by one of its teachers. The district court dismissed the suit based on the "ministerial exception," concluding that the suit would infringe on the church's First Amendment right to choose its religious leaders. But the Sixth Circuit reversed, concluding that the former employee was not covered by the ministerial exception, because she spent a majority of her time performing "secular" duties. In doing so, the court widened an existing circuit split, acknowledging that other circuits had "found that [its] approach is too rigid." *Id.* 16a n.7.

1. Petitioner Hosanna-Tabor Evangelical Lutheran Church and School ("the Church") is an ecclesiastical corporation and member congregation of The Lutheran Church—Missouri Synod. *Id.* 3a. The Missouri Synod is generally regarded as the most theologically conservative of the major Lutheran bodies. The Church operates a religious school that teaches kindergarten through eighth

grades. The purpose of the school is to provide a "Christ-centered education" based on biblical principles. *Id.* 4a-5a.

The school has two types of teachers: "lay" teachers and "called" teachers. Lay teachers are hired by the school board for a one-year term. *Id.* 3a. Called teachers are hired by a vote of the Church congregation and, like the Church pastor, cannot be summarily dismissed by the congregation without cause. *Ibid.*

Respondent Cheryl Perich served as one of the school's "called teachers." *Id.* 3a-4a. To become a called teacher, Perich was required by The Lutheran Church—Missouri Synod to complete university-level training in Lutheran theology and to be declared by a faculty committee to be prepared for ministry. *Id.* 3a, 33a, 51a. She was also required to be selected for her position by the voting members of the Church congregation; once selected, she was issued a call by the Church to serve as a "commissioned minister." *Id.* 3a-4a, 33a-34a. The Synod recognizes both "ordained" ministers and "commissioned" ministers; either status is clearly distinguished from the laity and from church employees who are not ministers.

As a commissioned minister, Perich was listed in a directory of qualified teachers published by The Lutheran Church—Missouri Synod. *Id.* 3a. She was authorized to claim a housing allowance for ministers on her federal income taxes (which she did). *Id.* 4a. And she was subject to the same employment and dispute resolution procedures as the Church pastor. *Id.* 51a.

Like all teachers at the school, Perich was expected to serve as a "Christian role model[]" and to "integrate faith into all subjects." *Id.* 5a, 35a. She taught the customary fourth-grade curriculum. *Id.* 4a. Critical here, she also taught religion classes four days a week, led students in daily devotional exercises, led students in prayer three times a day, and attended a chapel service with her students each week. *Ibid.* Twice a year, she led a school-wide chapel service. *Ibid.*

2. During the 2004-05 school year, Perich missed more than half the school year when her doctor diagnosed her with narcolepsy, and it was unclear when or if she would be able to return to work. *Id.* 5a-6a, 35a-36a. The school suggested that Perich apply for a disability leave of absence for the school year, which Perich did, and the school principal assured her that she would still have a job when she returned to health. *Id.* 5a.

In Perich's absence, the school first attempted to combine three grades into a single classroom, but when that proved infeasible, the school hired a replacement teacher for the rest of the year. *Id.* 7a n.1, 35a. The school then asked Perich to discuss with her doctor what responsibilities she could undertake in the following school year (2005-06). *Id.* 35a-36a.

Perich, however, obtained a release from her doctor and sought permission to return to work in the middle of the school year. *Id.* 7a, 37a. The school declined, expressing concern about Perich's ability to safely supervise students, and about the students' ability to adjust to a third new teacher in a single school year. *Id.* 6a-7a, 36a-37a. It asked Perich to

resign her call for the remainder of the school year, with the understanding that her call could be reinstated upon her return to work in the following school year. *Id.* 6a-7a, 36a-37a.

Perich refused this arrangement and told the school that she would report to work. When she reported to work, the school had no job for her. Citing the school handbook, which states that failure to return to work on the first day following the expiration of medical leave may be considered voluntary termination, Perich refused to leave school grounds until the school gave her a letter acknowledging that she had reported for work. *Id.* 8a, 37a. The school gave her a letter stating that she had provided improper notification of her return to work and asking her to continue her leave so that the school could develop a plan for her return. Later that day, when the school principal suggested that her conduct had placed her continued employment in jeopardy, Perich threatened to sue. *Id.* 8a, 38a.

The following month, the school board sent Perich a letter stating that it would recommend that the Church rescind Perich's call, citing her "insubordination and disruptive behavior," as well as her "threat[s] to take legal action." *Id.* 38a, 9a. Perich's attorney responded with a letter threatening legal liability. *Id.* 39a, 9a. At the next congregational meeting, pursuant to the Church's Constitution and Bylaws, the Church members voted 40 to 11 to rescind Perich's call. *Ibid.*; Record Entry 24-24 (4/10/05 Meeting Minutes at 1).

3. In May 2005, Perich filed a charge of discrimination and retaliation with the Equal Employment Opportunity Commission (EEOC). The EEOC then

filed a complaint against the Church under the Americans with Disabilities Act (ADA). The complaint did not allege disability discrimination; it alleged only a single count of retaliation. Pet. App. 9a-10a. Perich intervened and filed a complaint seeking an order reinstating her to her former position as a commissioned minister. *Id.* 73a.

The parties filed cross-motions for summary judgment. The Church claimed that the suit was barred by the ministerial exception because called teachers play a crucial role in the religious mission of the Church: They are trained in Lutheran theology; they are commissioned as ministers; they are subject to the same disciplinary rules as the church pastor; they teach religion classes; they lead students in prayer and worship; they lead chapel services; they incorporate religion into all subjects; and they serve as role models of the Church's teaching. Thus, a court order reinstating a called teacher, or imposing liability for the Church's selection of called teachers, would violate the Church's right to select its religious leaders.

The Church also emphasized that it fired Perich not for filing an ADA claim but because her insubordination and threats of litigation violated Church teaching. Like many Christian denominations, the Synod encourages its members to resolve most disputes within the Church rather than in civil court. *Id.* 50a. That teaching is embodied in the Synod's Bylaws, which provide a detailed procedure for internal dispute resolution and appeals. *Id.* 75a-104a. Perich made no attempt to use that procedure, even though the Synod's Bylaws require commissioned ministers to do so. *Id.* 77a-80a.

Perich argued that the ministerial exception should not apply because the majority of her duties consisted of teaching secular subjects from secular textbooks, and she said she rarely incorporated religion into secular subjects. She also claimed that the alleged doctrinal motivation for her firing was merely a pretext for unlawful retaliation.

The district court ruled in favor of the Church. It emphasized that the Church called Perich as a commissioned minister and held her out to the world as such, entering a "give-and-take relationship" with her that was "governed by the same rules as the church applies to its ordained ministers." *Id.* 51a. It also refused to second-guess the Church's view of the religious significance of called teachers, noting that federal courts are "inept when it comes to [deciding] religious issues." *Id.* 52a. Finally, it declined to adjudicate Perich's claim of pretext because doing so would "require[] some exploration of religious doctrine in violation of the First Amendment." *Id.* 50a-51a. However, the court acknowledged that "there are courts on both sides of the [ministerial exception issue] when it comes to elementary school teachers in religious schools," and "the courts remain sharply divided." *Id.* 44a, 43a.

4. The Sixth Circuit reversed. According to the two-judge majority, in order to determine whether the ministerial exception applies, a court must examine the "primary duties" of the employee. *Id.* 16a-17a. Under this standard, "an employee is considered a minister if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and

worship." *Ibid.* (internal quotations omitted). Applying this test, the Court held that Perich was not subject to the ministerial exception because "she spent the overwhelming majority of her day teaching secular subjects using secular textbooks." *Id.* 22a, 20a. The panel also emphasized that "lay" teachers and "called" teachers had the same basic teaching responsibilities, and that "at least one teacher at [the school]"—a lay teacher—"was not Lutheran." *Id.* 21a, 20a, 23a. It thus held that Perich's primary duties were not religious.

Judge White concurred separately to emphasize that she viewed "the relevant cases as more evenly split than does the majority." *Id.* 26a. As Judge White pointed out, "application of the primary-duties test has created a split of authority in several areas," and "several courts have recognized the lack of uniformity in this area." *Id.* 26a-27a n.2. Ultimately, however, Judge White agreed that the ministerial exception should not apply because called teachers and lay teachers had the same duties, and lay teachers were not required to be Lutheran. *Id.* 29a-30a.

The Sixth Circuit denied rehearing en banc on June 24, 2010. This petition followed.

REASONS FOR GRANTING THE WRIT

This Court has long recognized the right of religious organizations to control their internal affairs. *Watson* v. *Jones*, 80 U.S. 679, 728-29 (1871). This right includes the freedom of religious organizations "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952). Most importantly, it

includes the right of religious organizations to select their own religious leaders. *Ibid.*; *Serbian E. Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 724-25 (1976); *Gonzalez* v. *Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929).

Based on this right, twelve federal circuits have recognized the "ministerial exception." (The Federal Circuit has no jurisdiction over cases that could present the issue.) The ministerial exception bars lawsuits that interfere in the relationship between a religious organization and employees who perform religious functions—most obviously, lawsuits seeking to compel a religious organization to reinstate such an employee or seeking to impose monetary liability for the selection of such employees. As the first court adopting the ministerial exception explained: "The relationship between an organized church and its ministers is its lifeblood"; allowing the state to interfere in that relationship—effectively allowing judges and juries to pick ministers—would produce "the very opposite of that separation of church and State contemplated by the First Amendment." *McClure* v. *Salvation Army*, 460 F.2d 553, 558, 560 (5th Cir. 1972).[1]

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[1] The constitutional ministerial exception should not be confused with Title VII's religious exemption. 42 U.S.C. 2000e-1(a), 2000e-2(e)(2) (2006). See Pet. App. 26a n.1 (White, J., concurring). The statutory exemption applies to *any* employee of a religious organization, but only with respect to claims of *religious* discrimination. The ministerial exception applies only to employees performing religious functions, but it bars all employment-law claims that might dictate which employees perform those functions. The statutory exemption applies to all employees but few claims; the ministerial exception applies to many fewer employees but to many more claims.

Based on this principle, every circuit has agreed that the ministerial exception bars most lawsuits between a religious organization and its leaders. Every circuit has also agreed that the ministerial exception extends beyond formally designated "ministers" to include other employees who play an important religious role in the organization. And all eleven circuits to consider the question[2] have agreed that the ministerial exception survives this Court's decision in *Employment Division* v. *Smith*, which reaffirmed the cases underlying the ministerial exception—namely, cases forbidding the government from "lend[ing] its power to one or the other side in controversies over religious authority or dogma." 494 U.S. 872, 877 (1990).

But the agreement ends there. Federal circuits are in sharp and acknowledged conflict over what legal standard controls the boundaries of the ministerial exception, and specifically over the "primary duties" test used by the Sixth Circuit here. The conflict has produced directly conflicting results in

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[2] See, *e.g.*, *Rweyemamu* v. *Cote*, 520 F.3d 198, 204-10 (2d Cir. 2008); *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 303-09 (3d Cir. 2006); *EEOC* v. *Roman Catholic Diocese*, 213 F.3d 795, 800-05 (4th Cir. 2000); *Combs* v. *Cent. Tex. Annual Conf. of the United Methodist Church*, 173 F.3d 343, 348-50 (5th Cir. 1999); *Hollins* v. *Methodist Healthcare, Inc.*, 474 F.3d 223, 225-27 (6th Cir. 2007); *Alicea-Hernandez* v. *Catholic Bishop*, 320 F.3d 698, 702-04 (7th Cir. 2003); *Scharon* v. *St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362-63 (8th Cir. 1991); *Werft* v. *Desert Southwest Annual Conf. of the United Methodist Church*, 377 F.3d 1099, 1100-04 (9th Cir. 2004); *Bryce* v. *Episcopal Church*, 289 F.3d 648, 656-58 (10th Cir. 2002); *Gellington* v. *Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1302-04 (11th Cir. 2000); *EEOC* v. *Catholic Univ.*, 83 F.3d 455, 461-63 (D.C. Cir. 1996).

factually indistinguishable cases, and is widely recognized and firmly entrenched. This case presents an ideal vehicle for resolving the split and providing guidance on an important constitutional question.

I. The decision below widens an acknowledged conflict over the scope of the First Amendment's ministerial exception.

Four circuits have adopted the "primary duties" test; four have rejected it; and four have not opined on it. And even the circuits that have adopted the primary duties test are in conflict over how it should be applied.

A. Federal circuits are evenly divided over the legal standard that governs the scope of the ministerial exception.

1. The Third, Fourth, Sixth, and D.C. Circuits have adopted the "primary duties" test. See *Petruska*, 462 F.3d at 304 n.6, 307 (3d Cir. 2006); *Rayburn* v. *Gen. Conf. of Seventh-day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985); Pet. App. 16a-17a; *Catholic Univ.*, 83 F.3d at 463 (D.C. Cir. 1996). First adopted in 1985, that test holds that an employee is subject to the ministerial exception "if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." *Rayburn*, 772 F.2d at 1169 (quoting Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 Colum. L. Rev. 1514, 1545 (1979)). The basic idea is that courts must determine whether the employee is "important to the spiritual and pastoral mission of the church," *ibid.*;

and focusing on the employee's primary job duties is, in the view of these circuits, the best way to do so.

The Second, Fifth, Seventh, and Ninth Circuits have rejected the primary duties test, either criticizing it as "too rigid," *Rweyemamu*, 520 F.3d at 208 (2d Cir. 2008), "arbitrary," "suspect," and "problematic," *Alcazar* v. *Corp. of the Catholic Archbishop*, 598 F.3d 668, 675, 676 (9th Cir. 2010), reh'g granted en banc, 2010 WL 3169590 (Aug. 5, 2010), or simply ignoring it and applying a different test, *Starkman* v. *Evans*, 198 F.3d 173, 176-77 (5th Cir. 1999); *Schleicher* v. *Salvation Army*, 518 F.3d 472, 477-78 (7th Cir. 2008). These circuits consider all of the employee's job duties, not just those that are characterized as "primary"; and they consider the nature of the underlying employment dispute, emphasizing the need for secular courts to avoid becoming entangled in religious questions.

The First, Eighth, Tenth, and Eleventh Circuits have resolved ministerial exception claims on a case-by-case basis without enumerating a particular test; thus, they have not opined on the primary duties test either way. See, *e.g.*, *Natal* v. *Christian & Missionary Alliance*, 878 F.2d 1575, 1576 (1st Cir. 1989) (pastor of a church); *Scharon*, 929 F.2d at 362-63 (8th Cir. 1991) (chaplain at a religious hospital; court would "consider these situations on a case-by-case basis"); *Skrzypczak* v. *Roman Catholic Diocese*, 611 F.3d 1238, 1244 (10th Cir. 2010) (director of religious formation for a Catholic diocese); *Gellington*, 203 F.3d at 1302-04 (11th Cir. 2000) (minister of a church).

2. The circuits that have rejected the primary duties test have criticized it on two grounds, both

related to the entanglement of courts in religious questions.

a. First, as the Ninth Circuit has explained, "the 'primary duties' test [is] problematic" because its application frequently entangles courts in religious questions. *Alcazar*, 598 F.3d at 675. To apply the primary duties test, courts must first determine which duties are "secular" and which are "religious." But this labeling exercise is not a straightforward task. *Id.* at 675-76. As this Court has warned: "The line [between secular and religious] is hardly a bright one," and secular courts should not "require [a religious organization], on pain of substantial liability, to predict which of its activities a secular court will consider religious." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 336 (1987).

Rather than classifying duties as secular or religious, the Fifth, Seventh, and Ninth circuits ask merely whether the employee has some substantial duties that are considered religious from the standpoint of the religious organization. In *Alcazar*, for example, the parties disputed whether the employee (a Catholic seminarian) spent more time assisting with Mass or performing maintenance duties around the church. 598 F.3d at 675. But the Ninth Circuit panel declined to classify the disputed activities as secular or religious. *Id.* at 675-76. Instead, it held that the ministerial exception applied simply because the seminarian performed undisputedly religious duties (*i.e.*, assisting at Mass). *Id.* at 676. Unlike the "arbitrary 51% requirement implicit in the 'primary duties' test," this approach "acknowledg[es] that secular duties are often important to a

ministry," thus avoiding entanglement in religious questions. *Ibid.* The Fifth Circuit has adopted a similar test. *Ibid.* (citing *Starkman*, 198 F.3d at 176 (ministerial exception applied where choirmaster "engaged in activities traditionally considered ecclesiastical or religious," even though she claimed these activities were "not a primary duty")).

Similarly, in *Schleicher*, the Seventh Circuit considered whether the ministerial exception applied to the "administrators" of a Salvation Army rehabilitation center. 518 F.3d 472. The administrators led worship and had other unambiguously religious functions, but they also spent much of their time supervising Salvation Army thrift shops. The court refused to second-guess the religious significance of that work:

> [S]alvation through work is a religious tenet of the Salvation Army. The sale of the goods in the thrift shop is a commercial activity, on which the customers pay sales tax. But the selling has a spiritual dimension, and so, likewise, has the supervision of the thrift shops by ministers.

Id. at 477. Rather than applying the primary duties test, Judge Posner adopted "a presumption that clerical personnel" are covered by the ministerial exception, subject to "proof that * * * the minister's function [is] entirely rather than incidentally commercial." *Id.* at 477-78. (It is clear that "clerical" referred to clerics, not to clerks.) Unlike the primary duties test, this approach did not entangle the court in any religious questions.

b. Federal circuits have also rejected the primary duties test as "too rigid" because it "fails to consider

the nature of the dispute." *Rweyemamu*, 520 F.3d at 208 (2d Cir. 2008). Some disputes, by their nature, are more likely than others to involve religious questions. For example, a suit brought by a minister who was fired for heresy will likely involve religious questions; a suit brought by a minister who was "struck on the head by a falling gargoyle as he is about to enter the church" will not. *Ibid.* Focusing exclusively on the employee's "primary duties" is inadequate because some disputes have a greater potential than others to "entangle [the court] in doctrinal disputes." *Ibid.*

Most often, this issue arises when the religious organization offers a religious justification for a discharge, and the plaintiff claims that the religious justification is a pretext. In *Tomic* v. *Catholic Diocese*, 442 F.3d 1036 (7th Cir. 2006), for example, a Catholic church claimed that it discharged its organist for a religious reason (his choice of music for Easter Mass); the plaintiff claimed that the religious reason was a pretext for age discrimination. In another opinion by Judge Posner, the Seventh Circuit held that it could not resolve the claim of pretext:

> [I]f the suit were permitted to go forward, * * * [the plaintiff] would argue that the church's criticism of his musical choices was a pretext for firing him, that the real reason was his age. The church would rebut with evidence of what the liturgically proper music is for an Easter Mass and [the plaintiff] might in turn dispute the church's claim. The court would be asked to resolve a theological dispute.

Id. at 1040. The Second Circuit has rejected the primary duties test for the same reason. *Rweyemamu*, 520 F.3d at 208-09 (rejecting the primary duties test as "too rigid" and concluding that a claim of pretext "cannot be heard by us without impermissible entanglement with religious doctrine"); see also *Schleicher*, 518 F.3d at 474-75 (concluding that resolving a claim of pretext would produce "entanglements of the secular courts in religious affairs").

In sum, the Second, Fifth, Seventh, and Ninth Circuits have rejected the primary duties test because it causes two types of religious entanglement: (a) It forces courts to decide which duties are secular and which are religious; and (b) It forces courts to decide whether an employment decision was truly motivated by religious doctrine.

c. Both types of entanglement are on full display here. First, although the parties agree on the *content* of Perich's teaching duties, they disagree over whether some of those duties are secular or religious. According to Perich, using secular textbooks to teach secular subjects is a secular activity (Pet. App. 20a); but according to the Church, the same activity is religious because all teachers are required to serve as "fine Christian role models," provide a "Christ-centered education," and "integrate faith into all subjects" (*Id.* 4a-5a). The parties also disagree over the importance of Perich's indisputably religious duties: teaching religion, leading prayer, and leading worship.

Based on the primary duties test, the Sixth Circuit sided with Perich. On the nature of her duties, it held that the school's "generally religious character * * * does not transform [the teaching of secular

subjects] into religious activities." *Id.* 21a. And on the importance of her duties, it held that teaching religion, leading prayer, and leading worship were not her "primary function." *Id.* 20a. Thus, the court rejected the Church's views of which duties were religious, and which duties were most important.

This type of religious second-guessing is precisely why the Seventh and Ninth Circuits have rejected the primary duties test. And in those circuits, there is no doubt that the case would have come out differently. Under the Ninth Circuit's approach, the key question would be whether, from the standpoint of the Church, Perich performed religious duties. *Alcazar*, 598 F.3d at 676. There would be no need to decide whether classes were secular or religious, or which duties were most important; her unambiguously religious duties—teaching religion, leading prayer, leading worship—would be dispositive. *Ibid.* (ministerial exception applied where seminarian assisted with Mass).

The same is true under the Seventh Circuit's approach, where there is "a presumption that clerical personnel are [covered by the ministerial exception]," subject to rebuttal if, for example, "the minister's function [is] entirely rather than incidentally commercial." *Schleicher*, 518 F.3d at 478. Here, Perich is a commissioned minister and it is undisputed that her job is not entirely secular. Thus, like the administrators in *Schleicher*, her claim would be barred by the ministerial exception in the Seventh Circuit. *Ibid.*; accord *Alicea-Hernandez*, 320 F.3d at 703-04 (7th Cir. 2003) ("press secretary" with typical public-affairs duties was subject to the ministerial excep-

tion because she was "responsible for conveying the message of [the religious] organization").

This case also presents the second major class of entanglement concerns: entanglement due to claims of doctrinal pretext. Perich has brought a single count of retaliation, claiming that the Church fired her for suing under the ADA. The Church justifies the firing based on doctrinal concerns—namely, Perich's insubordination, and the Synod's teaching that church members should attempt to resolve their disputes within the church. Pet. App. 50a. That teaching is not only broadly shared among many Christian denominations and rooted in Scripture, it is also embodied in the Synod's Bylaws, which require all ministers to submit disputes over their calls to the Synod's dispute resolution process. Pet. App. 77a-80a; see 1 Corinthians 6:1-7 ("If any of you has a dispute with another, dare he take it before the ungodly for judgment instead of before the saints?").

The Sixth Circuit dismissed the risk of entanglement, suggesting that it would be fairly easy to determine "whether a doctrinal basis actually motivated Hosanna-Tabor's actions." Pet. App. 24a. But the court never says how. The decision to rescind Perich's call was a complex process, involving the interplay of Church doctrine, Church leaders, and a vote of the Church congregation. A court cannot determine the "true" motivation for the decision without scrutinizing Church doctrine, allowing the plaintiff to interrogate Church members and leaders, and no doubt resolving Perich's claims that their answers should not be credited. As this Court pointed out in *NLRB* v. *Catholic Bishop*, "the very process of inquiry" would inevitably entangle courts

in religious questions and "impinge on rights guaranteed by the Religion Clauses." 440 U.S. 490, 502 (1979). That is why the Second and Seventh Circuits have rejected the primary duties test and have consistently refused to resolve claims of pretext. See Part I.A.2.b, *supra*. There is no doubt that this case would come out differently under *Rweyemamu*, *Tomic*, and *Schleicher*.

3. There is a third and more fundamental problem with the primary duties test: It results in judges and juries deciding who will perform important religious functions. Perich is responsible for transmitting the faith to the next generation. She teaches their religion class; she leads them in prayer and in devotionals; she leads chapel services; she serves as a Christian role model. These are duties of great religious significance, and they are inseparable from the rest of her job. The children get religious instruction not from some "special" teacher they see for only a few minutes a day, but from their full-time teacher, with whom they develop a close personal relationship.

Under the Sixth Circuit's decision, a jury will decide whether Perich will continue to perform these essential religious functions. The jury will displace the duly constituted religious authorities and usurp control over who shall represent the faith to the next generation. Such displacement of religious authority is exactly what the ministerial exception is designed to prevent.

B. Even circuits that have accepted the "primary duties" test are in sharp conflict with the Sixth Circuit over what that test means.

Review is also warranted because the Sixth Circuit's decision widens a split among courts that have adopted the primary duties test. Specifically, these courts disagree over whether the primary duties test is predominantly qualitative or quantitative, and how that test applies to teachers at religious schools.

Here, the Sixth Circuit treated the primary duties test as a largely *quantitative* one, relying heavily on the fact that Perich's religious duties consumed only "forty-five minutes of the seven hour school day." Pet. App. 19a-20a. Two other courts have adopted the same quantitative approach, holding that parochial school teachers are not subject to the ministerial exception when they spend the majority of their time teaching secular subjects. See *Redhead* v. *Conf. of Seventh-day Adventists*, 440 F. Supp. 2d 211, 221 (E.D.N.Y. 2006) (ministerial exception did not apply because "[plaintiff's] religious [duties] were limited to only one hour of Bible instruction per day); *Guinan* v. *Roman Catholic Archdiocese*, 42 F. Supp. 2d 849, 852 (S.D. Ind. 1998) (ministerial exception did not apply because "the vast majority of [plaintiff's] duties involved her teaching secular courses, such as math or science").

But other courts—including the Fourth Circuit and the Wisconsin Supreme Court—have criticized this quantitative approach and reached the opposite result on identical facts. In *Clapper* v. *Chesapeake Conference of Seventh-day Adventists*, the Fourth Circuit considered age and race discrimination

claims brought by an elementary teacher at a Seventh-day Adventist school. 166 F.3d 1208, 1998 WL 904528 at *1 (4th Cir. Dec. 29, 1998) (unpublished). As in this case, the teacher led students in prayer and religion classes each day, but the teacher argued that he was not covered by the ministerial exception because he spent only thirty percent of his time on religious activities. *Id.* at *3 n.2, *6.

The Fourth Circuit rejected the teacher's argument, explaining that it "incorrectly limit[ed] the primary duties test to a purely quantitative test rather than one that obviously has both quantitative and qualitative elements." *Id.* at *7. Based in part on the qualitative elements of his employment duties—such as the fact that "the Seventh-day Adventist Church relies heavily upon its full-time, elementary school teachers to carry out its sectarian purpose"—the Fourth Circuit held that the teacher was subject to the ministerial exception. *Ibid.*

Similarly, in *Coulee Catholic Schools* v. *Labor & Industry Review Commission*, 768 N.W.2d 868 (Wis. 2009), the first grade teacher at a Catholic elementary school had duties indistinguishable from Perich's: She taught religion class three days per week, led students in prayer twice per day, and helped plan a worship service every four weeks. *Id.* at 873. Moreover, the school did not require teachers to be Catholic, and "[t]he majority of [plaintiff's] duties were teaching 'secular' subjects" using secular textbooks. *Id.* at 887-88, 873; *id.* at 897 (Crooks, J., dissenting).

Nevertheless, the Wisconsin Supreme Court held that the teacher was subject to the ministerial exception. Rejecting a "quantitative approach" to the

primary duties test, the court instead adopted a "'functional' approach," focusing not only on the time spent on various duties, but also on other employment factors, such as "hiring criteria, the job application, the employment contract, * * * performance evaluations, and the understanding or characterization of a position by the organization." *Id.* at 882, 883. Based on these qualitative factors, it was "obvious" that her primary duties were religious. *Id.* at 889-90.

Clapper and *Coulee* are indistinguishable from this case. The majority below attempted to distinguish *Clapper* on the ground that teachers there "were required to be 'tithe paying members of the Seventh-day Adventist Church and are expected to participate in church activities, programs, and finances.'" Pet. App. 22a-23a (quoting *Clapper*). But nothing in *Clapper* suggested that the church-membership requirement was dispositive, and in any event, Perich was subject to more stringent religious requirements: She was required to complete university-level theology training, was hired by a vote of the congregation, and was subject to the same disciplinary rules as the church pastor.

The majority did not try to distinguish *Coulee*, and the concurrence conceded that *Coulee* "present[s] [a] situation[] similar to that here." Pet. App. 28a. Although the concurrence tried to distinguish *Coulee* on the ground that it involved a more rigorous "religious yardstick for qualification as a teacher," *id.* 29a, that is simply incorrect. In *Coulee*, "[teachers] w[ere] not required to be Catholic," but simply to "engage in Catholic worship, model Catholic living, and impart Catholic teaching." 768 N.W.2d at 891.

Here, too, it is undisputed that all teachers must participate in Lutheran worship, be "fine Christian role models," and impart Lutheran teaching. Pet. App. 5a. But this case is significantly stronger: Called teachers are required to be Lutheran and to have university-level theology training (*id.* 3a), they are subject to the same disciplinary rules as the Church pastor (*id.* 51a), and Perich was discharged for reasons of Church doctrine (*id.* 49a-50a). None of these facts was present in *Coulee*. In short, the Sixth Circuit's decision squarely conflicts with the decisions of the Wisconsin Supreme Court and the Fourth Circuit.

C. The conflict is firmly entrenched and is only growing wider.

The 4–4 split over the primary duties test is mature and entrenched. The Fifth Circuit first recognized the ministerial exception almost forty years ago, *McClure*, 460 F.2d at 560, and the Fourth Circuit adopted the primary duties test in 1985, *Rayburn*, 772 F.2d at 1169. By 1997, the primary duties test was well-established in the law of the Fourth and D.C. Circuits. See *ibid.*; *Catholic Univ.*, 83 F.3d 455 (D.C. Cir. 1996); *Bell* v. *Presbyterian Church (U.S.A.)*, 126 F.3d 328 (4th Cir. 1997); *Roman Catholic Diocese*, 213 F.3d 795 (4th Cir. 2000); *Shaliehsabou* v. *Hebrew Home*, 363 F.3d 299 (4th Cir. 2004).

Yet from 1999 to 2008, in a series of five decisions, the Fifth and Seventh Circuits considered the views of the Fourth and D.C. Circuits and repeatedly

applied a different test.[3] Moreover, the Third and Sixth Circuits have also adopted the primary duties test, despite considering contrary authority from the Second, Fifth, and Seventh Circuits. *Petruska*, 462 F.3d at 304 n.6 (3d Cir. 2006); Pet. App. 16a n.7. And now the Second and Ninth Circuits have weighed in, expressly considering and rejecting the approaches of the Third, Fourth, and D.C. Circuits. *Rweyemamu*, 520 F.3d at 208 (2d Cir. 2008); *Alcazar*, 598 F.3d at 676 (9th Cir. 2010) ("We decline * * * to adopt the Fourth and D.C. Circuits 'primary functions' test."). Although *Alcazar* is subject to en banc review, that cannot resolve the conflict; at most it can make the split 5–3 instead of 4–4. Thus, as the opinions below demonstrated (Pet. App. 16a n.7; 26a-27a n.2 (White, J., concurring)), federal circuits are well-aware of the conflicting approaches to the ministerial exception; the conflict has persisted for many years; and the conflict has only become sharper and more entrenched.

Although other petitions have been filed in ministerial exception cases,[4] the split has become sharper

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[3] See *Combs*, 173 F.3d at 347-49 (5th Cir. 1999) (citing *Rayburn* (4th Cir. 1985), and considering *Catholic University* (D.C. Cir. 1996)); *Starkman*, 198 F.3d at 175-76 (5th Cir. 1999) (citing *Rayburn* and *Catholic University*); *Alicea-Hernandez*, 320 F.3d at 703-05 (7th Cir. 2003) (discussing *Rayburn* and *Roman Catholic Diocese* (4th Cir. 2000)); *Tomic*, 442 F.3d at 1038-42 (7th Cir. 2006) (citing *Rayburn*, *Catholic University*, and *Roman Catholic Diocese*); *Schleicher*, 518 F.3d at 475 (7th Cir. 2008) (citing *Shaliehsabou* (4th Cir. 2004)). Each of these cases cited or discussed cases applying the primary duties test, but none adopted it.

[4] See, *e.g.*, Petition for Writ of Certiorari, *Archdiocese of Wash.* v. *Moersen*, 128 S.Ct. 1217 (2007) (No. 07-323); Petition for Writ of Certiorari, *Petruska* v. *Gannon Univ.*, 127 S.Ct. 2098 (2007)

and deeper in the last three years. The Seventh Circuit has adopted a totally different approach. *Schleicher*, 518 F.3d at 477-78 (2008). The Second and Ninth Circuits have strongly criticized the primary duties test. *Rweyemamu*, 520 F.3d at 208 (2008); *Alcazar*, 598 F.3d at 675 (2010). And the Sixth Circuit has joined the primary duties side of the split, first in dictum in *Hollins* v. *Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007), where the employee had waived the issue, *ibid.*, and now in its holding here.

Finally, this case presents an ideal vehicle for resolving the conflict. The constitutional question is directly presented by the facts of the case, was fully litigated below, and formed the sole basis of the Sixth Circuit's decision.

II. The decision below conflicts with this Court's cases forbidding secular courts from interfering in religious disputes.

Certiorari is also warranted because the decision below conflicts with the decisions of this Court. Although this Court has never decided a ministerial exception case by that name, three lines of precedent bear directly on the case at hand. One line prohibits courts from interfering in matters of church governance; another prohibits courts from deciding religious questions; and a third prohibits state interference with the right of expressive association. The decision below conflicts with all three.

(No. 06-985), Petition for Writ of Certiorari, *Tomic* v. *Catholic Diocese*, 127 S.Ct. 190 (2006) (No. 06-15).

1. This Court has long prohibited state interference in matters of church governance. A long series of cases limits the role of the civil courts in resolving property disputes between competing factions of a church. *Jones* v. *Wolf*, 443 U.S. 595 (1979); *Md. & Va. Churches* v. *Sharpsburg Church*, 396 U.S. 367 (1970); *Presbyterian Church* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Watson* v. *Jones*, 80 U.S. 679 (1874).

More closely in point are cases precluding the civil courts from interfering with the selection of religious leaders. In *Gonzalez* v. *Roman Catholic Archbishop*, 280 U.S. 1 (1929), the plaintiff claimed a legal right, under the terms of a will, to be appointed to an endowed chaplaincy in the Catholic Church. The archbishop refused, deeming the plaintiff unqualified. Noting that "it is the function of the church authorities to determine what the essential qualifications of a chaplain are," this Court refused to order the church to accept a chaplain it had rejected. *Id.* at 16-17.

Similarly, in *Kedroff* v. *Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94 (1952), the Court struck down a New York law that would have transferred control of a cathedral. According to the Court, religious organizations have a constitutionally protected freedom "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 116. Thus, the state had no business "displac[ing] one church administrator with another." *Id.* at 119.

In *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976), a church defrocked a bishop for insubordination, and the bishop chal-

lenged his removal in state court. The Illinois Supreme Court invalidated the removal under state law. *Id.* at 712-13. But this Court reversed, concluding that the First Amendment protects the right of religious organizations, free from state interference, "to establish their own rules and regulations for internal discipline and government." *Id.* at 724. Most recently, in *Employment Division v. Smith*, this Court cited *Kedroff* and *Serbian* for the principle that government cannot take sides in disputes over religious authority. 494 U.S. at 877.

As in *Gonzalez*, *Kedroff*, and *Serbian*, rules of internal church government and selection of religious leaders are at the heart of this case. Perich lost her job not because school officials fired her, but because the Church congregation, acting pursuant to its own governing documents and the Synod Constitution and Bylaws, voted to rescind her "call" as a commissioned minister. Her lawsuit challenges that vote as pretextual; but pretextual or not, the vote is the ultimate exercise of Church authority on Perich's fitness to serve as a minister. (She was entitled to challenge the congregational vote to rescind her call through the Synod's dispute resolution process, but she has not done so.) Just as secular courts in *Serbian* had no business reinstating a bishop, the courts here have no business reinstating a commissioned minister and called teacher who teaches religion and leads children in worship.

This Court has similarly rejected government interference in the control of religious schools. In *NLRB* v. *Catholic Bishop*, the NLRB ordered Roman Catholic high schools to engage in collective bargaining with their lay teachers. 440 U.S. at 494. But this

Court reversed, holding that mandatory collective bargaining would raise "serious First Amendment questions." *Id.* at 504. As the Court explained: "Religious authority necessarily pervades" a religious school, and teachers play a "critical and unique role" in fulfilling the school's religious mission. *Id.* at 501. Forcing a school to bargain with its teachers would inject the state into the middle of that relationship, "giv[ing] rise to entangling church–state relationships of the kind the Religion Clauses sought to avoid." *Id.* at 503 (quoting *Lemon*). To avoid such entanglement, the Court interpreted the Act not to apply to church-operated schools. *Id.* at 507.

If it is constitutionally problematic to force a religious school to bargain with a teachers' union over the terms and conditions of employment, it is even more problematic to force a religious school to reinstate a teacher responsible for religious instruction.

This Court's earlier cases on financial aid to religious schools reinforce the same principle. In *Lemon* v. *Kurtzman*, this Court struck down state funding to teachers of secular subjects in religious schools. 403 U.S. 602 (1971). Because of the "substantial religious character" of the schools, there was a "danger that a teacher under religious control and discipline" would inject "some aspect of faith or morals in secular subjects." *Id.* at 616-17. At that time, the Court required the state to forestall this danger; and to do that, the state would have to monitor the schools to ensure that government funds were not used for religious instruction. Such monitoring would produce "excessive and enduring entanglement between state and church" in violation of the First Amendment. *Id.* at 619. The Court eventually held that no such

monitoring is required if the funds are delivered through a program of true private choice. *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002). But it has never suggested that such monitoring would be permissible, or that government interference with the religious functions of religious school teachers would be permissible.

The problem here is much greater than in the *Lemon*-era funding cases. Under *Lemon*, the government is prohibited from monitoring even secular classes to ensure that religious doctrine does not intrude; but under the decision below, the government can dictate who will teach religion classes, organize religious services, and lead students in prayer.

2. The decision below also conflicts with cases prohibiting secular courts from deciding religious questions. See, *e.g.*, *Presbyterian Church* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969) (forbidding courts from deciding "controversies over religious doctrine"). In *Corporation of the Presiding Bishop* v. *Amos*, the Court emphasized "the difficulties" inherent in distinguishing between secular and religious activities. 483 U.S. 327, 336 n.14 (1987). According to the Court, religious organizations should not face liability based on "which of its activities a secular court will consider religious." *Id.* at 336.

But that is just what the court below has threatened here. Under the primary duties test, the court rejected the Church's view of which duties were secular and which were religious, and it rejected the relevance of indisputably religious duties. Thus, it has exposed the Church to liability, and even rein-

statement of a commissioned minister, based on what the court believes to be religiously significant. Pet. App. 20a-23a.

Religious questions are also at the heart of Hosanna-Tabor's defense on the merits. According to the Church, it rescinded Perich's call for doctrinal reasons—namely, disruption and insubordination, along with its belief that congregations and ministers should use the Synod's dispute resolution process. *Id.* 38a, 50a, 77a-80a. Perich claims that this doctrinal motivation is a pretext. In order to resolve this dispute, the court will have to decide whether the Church was truly motivated by its religious doctrine.

This Court prohibited just such an inquiry in *NLRB* v. *Catholic Bishop*. There, the Court noted the inevitable entanglement that would result from mandatory collective bargaining at religious schools: Teachers would charge the schools with an unfair labor practice; the school would defend on the ground that its conduct was doctrinally motivated; and the teachers would claim the doctrinal motivation was pretextual. 440 U.S. at 502. The Board would then be forced to inquire "into the good faith of the position asserted by the [school] and its relationship to the school's religious mission." *Ibid.* "It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses," the Court said, "but also the very process of inquiry leading to findings and conclusions." *Ibid.* That is precisely why other circuits, in conflict with the court below, have refused to resolve claims of pretext. See Part I.A.2.b, *supra*.

3. Finally, the decision below conflicts with cases protecting the First Amendment freedom of association. This Court has long recognized that the rights of free speech and free exercise include "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 622 (1984). Burdens on this right of association can take many forms, but "[t]here can be no clearer example of an intrusion" on this right "than a regulation that forces the group to accept members it does not desire." *Id.* at 623.

This principle applies to both religious and nonreligious organizations. It protects the right of political parties to select their own leaders, *Eu* v. *San Francisco County Democratic Central Committee*, 489 U.S. 214, 229 (1989), to select who can vote in party primaries, *California Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000), and to select who can be a member, *New York State Board of Elections* v. *Lopez Torres*, 552 U.S. 196, 202 (2008); *Democratic Party* v. *Wisconsin*, 450 U.S. 107, 122 (1981). It protects the Boy Scouts' right to exclude a leader who undermines the Scouts' message on an important issue. *Boy Scouts* v. *Dale*, 530 U.S. 640, 659 (2000).

These cases are fully applicable by analogy here. Just as the right of free speech includes the right to associate for purposes of speaking, the right of free exercise includes the right to associate for purposes of religious exercise. *Roberts*, 468 U.S. at 618. Teaching religion to children is both—free speech and religious exercise. The ministerial exception is designed precisely to protect the right to associate for the purpose of teaching a religious message—a

message chosen by the religious organization and subject to that organization's control.

4. These three lines of authority—protecting the right to exercise religious governance, to resolve religious questions, and to select religious spokespersons—converge in the ministerial exception. They fully apply to a teacher who teaches religion to young children, leads them in devotional exercises, leads them in prayer, and leads them in worship—even if she also teaches them reading, writing, and arithmetic. The Sixth Circuit's narrow understanding of the ministerial exception threatens to force a religious school to reinstate an unwanted teacher to perform all these functions. Such a result violates the core intuition, central to both Religion Clauses, that no agency of government should appoint religious leaders.

III. The scope of the ministerial exception is a vital and recurring question for thousands of religious organizations across the country.

Finally, review is warranted because of the sweeping practical significance of the question presented. That question is both frequently recurring and vital to the daily operations of religious organizations.

1. Conflict over the scope of the ministerial exception arises frequently in the lower courts. In the last five years alone, federal circuit courts have issued fourteen opinions in cases involving the ministerial

exception;[5] federal district courts have issued forty;[6] and state courts have issued many more.[7]

One reason the issue is so often litigated is procedural. Unlike many constitutional questions, courts treat the ministerial exception as a threshold issue that must be decided before the merits. Some courts analogize the ministerial exception to qualified immunity, *e.g.*, *Petruska*, 462 F.3d at 302-03; others treat it as a limitation on courts' subject matter jurisdiction, *e.g.*, Pet. App. 10a-11a. Either way, courts decide the ministerial exception before the merits, making the ministerial exception a frequent basis of decision.

The ministerial exception also arises in many different types of cases. Although it is probably invoked

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[5] See *Skrzypczak*, 611 F.3d 1238 (10th Cir. 2010); *McCants* v. *Ala.-W. Fla. Conf. of United Methodist Church, Inc.*, 372 Fed. Appx. 39 (11th Cir. 2010) (unpublished); *Alcazar*, 598 F.3d 668 (9th Cir. 2010); *Hosanna-Tabor*, Pet. App. 1a-30a; *Hankins* v. *New York Annual Conf. of United Methodist Church*, 351 Fed. Appx. 489 (2d Cir. 2009) (unpublished); *Friedlander* v. *Port Jewish Ctr.*, 347 Fed. Appx. 654 (2d Cir. 2009) (unpublished); *Rweyemamu* v. *Cote*, 520 F.3d 198 (2d Cir. 2008); *Schleicher*, 518 F.3d 472 (7th Cir. 2008); *Bethea* v. *Nation of Islam*, 248 Fed. Appx. 331 (3d Cir. 2008) (unpublished); *Hollins*, 474 F.3d 223 (6th Cir. 2007); *Petruska*, 462 F.3d 294 (3d Cir. 2006), *Tomic*, 442 F.3d 1036 (7th Cir. 2006); *Hankins* v. *Lyght*, 441 F.3d 96 (2d Cir. 2006), *Cooper-Igwebuike* v. *United Methodist Church*, 160 Fed. Appx. 549 (8th Cir. 2005) (unpublished).

[6] A Westlaw search for "ministerial exception" in the last five years yields fifty-seven results in federal district courts. Forty of those results address the ministerial exception.

[7] A Westlaw search for "ministerial exception" in the last five years yields thirty-nine results in state court. Twenty-six of those results address the ministerial exception.

most often in employment discrimination cases, it also applies to other employment claims in which reinstatement is a potential remedy or in which monetary liability might be based on a decision to employ or not to employ a particular religious leader. It applies to "any claim, the resolution of which would limit a religious institution's right to select who will perform particular spiritual functions." *Petruska*, 462 F.3d at 307.

Finally, the scope of the ministerial exception is important to many religious employers. Not including colleges and universities, there are over 20,000 religious schools in the country. Inst. for Educ. Scis., U.S. Dep't of Educ., *Characteristics of Private Schools in the United States* 7 (2009), http://nces.ed.gov/pubs2009/2009313.pdf. Each one is affected by the rule in this case. Beyond that, the scope of the ministerial exception is relevant to religious colleges, *Catholic University*, 83 F.3d 455, hospitals, *Scharon*, 929 F.2d 360, social service organizations, *Shaliehsabou*, 363 F.3d 299, and churches themselves.

2. The scope of the ministerial exception also has immense practical consequences for religious groups. A narrow primary duties test—covering only priests, pastors, and others focusing on "church governance" and "supervision," Pet. App. 20a—leaves religious organizations exposed to liability for many important decisions about internal governance and core religious functions. Under such a narrow test, a religious organization cannot simply make employment decisions based on its religious principles. It must consider whether the employee might sue, whether the organization can afford costly litigation and

potential liability, and whether it will be clear to the court that the employee has religious duties and that those duties are primary. The religious organization may feel compelled to retain an employee who is teaching the faith, or misteaching it, even when the religious authorities have no confidence in that employee. As this Court warned, "[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission." *Amos*, 483 U.S. at 336.

Potential liability can also affect the way religious organizations apportion duties among their employees. A narrow primary duties test creates an incentive for religious organizations to concentrate religious functions in a few individuals who are unambiguously clergy, rather than spreading those functions across a broader group of employees. The distribution of authority and function between the clergy and the laity is of course one of the central issues dividing Christian denominations. In the context of religious schools, a narrow primary duties test encourages religious schools to have one religion teacher instead of entrusting that task to the teachers the children know and love best. That way, if a dispute over religious functions arises, the school can dismiss the one clearly ministerial employee without risk of liability. But it buys this protection at the price of undermining its mission and changing its organizational structure. Narrowing the scope of the ministerial exception thus presses religious organizations to change the way they are organized.

To some extent, employment laws exert this sort of influence on all organizations, whether secular or religious. But with respect to religious organizations,

this Court has repeatedly recognized that there are important constitutional limits. Thus, the question presented in this case not only affects thousands of religious organizations, but it presents an issue of core ecclesiastical, and constitutional, concern.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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OCTOBER 2010

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant (09-1134),

CHERYL PERICH,
Intervenor Plaintiff-Appellant (09-1135),

v.

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,
Defendant-Appellee.

Nos. 09-1134/1135

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 07-14124—Patrick J. Duggan, District Judge.

Argued: October 6, 2009

Decided and Filed: March 9, 2010

Before: GUY, CLAY, and WHITE, Circuit Judges.

COUNSEL

ARGUED: Dori K. Bernstein, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., James E. Roach, VERCRUYSSE MURRAY & CALZONE PC, Bingham Farms, Michigan, for Appellants. Deano C. Ware, DEANO C. WARE, P.C., Redford, Michigan, for Appellee.

ON BRIEF: Dori K. Bernstein, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., James E. Roach, VERCRUYSSE MURRAY & CALZONE PC, Bingham Farms, Michigan, for Appellants. Deano C. Ware, DEANO C. WARE, P.C., Redford, Michigan, for Appellee.

CLAY, J., delivered the opinion of the court, in which GUY, J., joined. WHITE, J. (pp. 19-22), delivered a separate concurring opinion.

OPINION

CLAY, Circuit Judge. Plaintiffs, Equal Employment Opportunity Commission ("EEOC") and Cheryl Perich, appeal from the district court's order granting summary judgment in favor of Defendant Hosanna-Tabor Evangelical Lutheran Church and School ("Hosanna-Tabor") in this action alleging discrimination in violation of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12117(a) (the "ADA"). For the reasons set forth below, we **VACATE** the district court's order and **REMAND** the case for further proceedings consistent with this opinion.

BACKGROUND

This case arises out of Perich's employment relationship with Hosanna-Tabor, which terminated

Perich from her teaching position on April 11, 2005. Hosanna-Tabor, an ecclesiastical corporation affiliated with the Lutheran Church-Missouri Synod (the "LCMS"), operates a church and school in Redford, Michigan. The school teaches kindergarten through eighth grades. The faculty consists of two types of teachers: (1) "lay" or "contract" teachers, and (2) "called" teachers. Contract teachers are hired by the Board of Education for one-year renewable terms of employment. Called teachers are hired by the voting members of the Hosanna-Tabor church congregation upon the recommendation of the Board of Education, Board of Elders, and Board of Directors. Called teachers are hired on an open-ended basis and cannot be summarily dismissed without cause. They can also apply for a housing allowance on their income taxes provided that they are conducting activities "in the exercise of the ministry." (Dist. Ct. R.E. 25 Ex. Q).

To be eligible for a "call," a teacher must complete the colloquy classes required by the LCMS, which focus on various aspects of the Christian faith. After completing the colloquy, a teacher receives a certificate of admission into the teaching ministry, and the Michigan District of the LCMS places the teacher's name on a list that can be accessed by schools that need teachers. Once selected by a congregation, a called teacher receives the title of "commissioned minister."

In July 1999, Hosanna-Tabor hired Perich as a contract teacher to teach kindergarten on a one year contract from August 15, 1999 to June 15, 2000. After Perich completed the required colloquy classes at Concordia College in February 2000, Hosanna-

Tabor hired Perich as a called teacher on March 29, 2000. Perich continued teaching kindergarten until the end of the 2002-2003 year. She taught fourth grade during the 2003-2004 school year, and she was assigned to teach third and fourth grades for the 2004-2005 school year. From the time she was hired as a called teacher until her termination, Perich was listed as a commissioned minister in the LCMS. At least once during her tenure, Perich claimed the housing allowance on her income taxes.

After Perich was hired as a called teacher, her employment duties remained identical to the duties she performed as a contract teacher. Perich taught math, language arts, social studies, science, gym, art, and music. Language arts instruction included reading, English, spelling, and handwriting. Music instruction included secular music theory and playing the recorder, using the same music book as the local public school. During the 2003-2004 school year, Perich taught computer training as well.

Perich also taught a religion class four days per week for thirty minutes, and she attended a chapel service with her class once a week for thirty minutes. Approximately twice a year, Perich led the chapel service in rotation with other teachers. Perich also led each class in prayer three times a day for a total of approximately five or six minutes. During her final year at Hosanna-Tabor, Perich's fourth grade class engaged in a devotional for five to ten minutes each morning. In all, activities devoted to religion consumed approximately forty-five minutes of the seven hour school day.

Hosanna-Tabor's website indicates that the school provides a "Christ-centered education" that helps

parents by "reinforcing bible principals [sic] and standards." Hosanna- Tabor describes its staff members as "fine Christian role models who integrate faith into all subjects." Perich valued the freedom a sectarian school afforded to "bring God into every subject taught in the classroom." (Dist. Ct. R.E. 37 Ex. 1 ¶ 23). However, Perich taught secular subjects using secular textbooks commonly used in public schools, and she can only recall two instances in her career when she introduced religion into secular subjects.

Furthermore, Hosanna-Tabor does not require teachers to be called or even Lutheran. Non-Lutheran teachers have identical responsibilities as Lutheran teachers, including teaching religion classes and leading chapel service. Members of the custodial staff and at least one teacher who worked at Hosanna-Tabor were not Lutheran.

At a church golf outing in June 2004, Perich suddenly became ill and was taken to the hospital. She underwent a series of medical tests to determine the cause. Perich's doctors had not reached a definitive diagnosis by August, and Hosanna-Tabor administrators suggested that Perich apply for a disability leave of absence for the 2004-2005 school year. The principal of Hosanna-Tabor, Stacy Hoeft, informed Perich that she would "still have a job with [Hosanna-Tabor]" when she regained her health. (Dist. Ct. R.E. 24 Ex. 6). Perich agreed to take a disability leave and did not return to work at the beginning of the 2004-2005 school year. Throughout her leave, Perich regularly provided Hoeft with updates about her condition and progress.

On December 16, 2004, Perich informed Hoeft by email that her doctor had confirmed a diagnosis of narcolepsy and that she would be able to return to work in two to three months once she was stabilized on medication. On January 19, 2005, Hoeft asked Perich to begin considering and discussing with her doctor what she might be able to do upon return. Perich responded the same day that she had discussed her work day and teaching responsibilities with her doctor, and he had assured her that she would be fully functional with the assistance of medication. Perich reiterated this sentiment with additional explanation on January 21, 2005.

Also on January 21, 2005, Hoeft informed Perich that the school board intended to amend the employee handbook to request that employees on disability for more than six months resign their calls to allow Hosanna-Tabor to responsibly fill their positions. Such resignations would not necessarily prevent reinstatement of these employees' calls upon their return to health. Perich had been on disability for more than five months when she received this email.

On January 27, 2005, Perich wrote to Hoeft that she would be able to return to work between February 14 and February 28, 2005. Hoeft responded with surprise, because Perich had indicated a few days before that she had been unable to complete her disability forms because of her condition. Hoeft expressed concern that Perich' s condition would jeopardize the safety of the students in her care. Hoeft also indicated that Perich would not be teaching the third and fourth grades upon return, because the substitute teacher had a contract

that ran through the end of the school year.[1] Furthermore, she indicated that the third and fourth grade students had already had two teachers that year and having a third would not provide a good learning environment for them.

Three days later, at the annual congregational "shareholder" meeting, Hoeft and the school board expressed their opinion that it was unlikely that Perich would be physically capable of returning to work that school year or the next. Consequently, the congregation adopted the Board's proposal to request that Perich accept a peaceful release agreement wherein Perich would resign her call in exchange for the congregation paying for a portion of her health insurance premiums through December 2005. On February 7, 2005, the Board selected Chairman Scott Salo to discuss this proposal with Perich.

On February 8, 2005, Perich's doctor gave her a written release to return to work without restrictions on February 22, 2005. The next day Salo contacted Perich to discuss her employment. Perich instead requested to meet with the entire school board. At the meeting on February 13, 2005, the Board presented the peaceful release proposal, and Perich responded by presenting her work release note. The Board continued to express concerns about Perich's

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[1] In November 2004, the Board of Directors began making plans to fill Perich's position. The Board first decided to combine three grades into one classroom with one teacher and one part time teaching assistant. In response to teacher and parent complaints concerning the stress of teaching three grades with one teacher, the Board hired a long-term substitute for Perich. Hoeft notified Perich of the Board's decision on January 10, 2005.

ability to supervise students for the entire day. Perich explained that, as of her doctor's release on February 22, 2005, she would no longer be eligible for disability coverage and would be required to return to work. The Board, however, continued to request that Perich resign and asked her to respond to the peaceful release proposal by February 21, 2005.

Shortly after 9:00 p.m. on February 21, 2005, Perich emailed Hoeft to confirm that she had decided not to resign from her position and that she planned to return to work in the morning. When Perich reported to work on February 22, 2005, the school did not have a job for her. Because the school handbook states that failure to return to work on the first day following the expiration of an approved medical leave may be considered a voluntary termination, Perich refused to leave school grounds until she received a letter acknowledging that she appeared for work. Perich received a letter signed by Hoeft and Salo, which said that Perich had provided improper notification of her return to work and asked that she continue her leave to allow the congregation a chance to develop a possible plan for her return. Perich took the letter and left the premises.

Later that day, Perich spoke with Hoeft over the phone. Hoeft told Perich that she would likely be fired, and Perich told Hoeft that she would assert her legal rights against discrimination if they were unable to reach a compromise. Perich asked Hoeft to transmit that information to the Board. Perich also sent Hoeff an email stating that her doctor had reaffirmed that she was healthy and ready to return to work. Following the Board's meeting on February 22, 2005, Salo sent Perich a letter describing Perich's

conduct as "regrettable" and indicating that the Board would review the process of rescinding her call based on her disruptive behavior. (Dist. Ct. R.E. 22 Ex. B).

On March 19, 2005, Salo sent Perich a follow-up letter stating that, based on Perich's insubordination and disruptive behavior on February 22, 2005, the Board would request rescinding Perich's call at the next voter's meeting on April 10, 2005. The letter also stated that Perich had "damaged, beyond repair" her working relationship with Hosanna-Tabor by "threatening to take legal action," and it laid out the voting procedure by which the congregation could depose a called minister. (Dist. Ct. R.E. 24 Ex. 1). Finally, the letter again proposed the peaceful release offer and gave Perich until April 8, 2005 to accept the offer.

On March 21, 2005, Perich's lawyer sent a letter to Hosanna-Tabor's lawyer stating that Hosanna-Tabor's actions amounted to unlawful discrimination. The letter asked Hosanna-Tabor to respond seeking an amicable resolution to the matter, or else Perich would be forced to bring a lawsuit or file a complaint with the EEOC. On April 10, 2005, the congregation voted to rescind Perich's call. The next day, Salo informed Perich of her termination.

On May 17, 2005, Perich filed a charge of discrimination and retaliation with the EEOC alleging that Hosanna-Tabor had discriminated and retaliated against her in violation of her rights under the ADA. On September 28, 2007, the EEOC filed a complaint against Hosanna-Tabor in the United States District Court for the Eastern District of Michigan alleging one count of retaliation in

violation of the ADA. Perich moved to intervene on March 11, 2008; she was granted leave and filed her own complaint on April 10, 2008, which added a cause of action under Michigan's Persons with Disabilities Civil Rights Act, M.C.L. §37.1201(b) (the "PDCRA"). Perich and Hosanna-Tabor each filed motions for summary judgment on July 15, 2008. On October 23, 2008, the district court granted summary judgment in favor of Hosanna-Tabor, dismissing the claim on the grounds that the court could not inquire into her claims of retaliation because they fell within the "ministerial exception" to the ADA. Perich timely sought reconsideration pursuant to Federal Rule of Civil Procedure 59(e) on November 6, 2008, which was denied on December 3, 2008. Perich and the EEOC timely filed notices of appeal on January 30, 2009.

DISCUSSION

I. Standard of Review

This Court reviews *de novo* a district court's order of dismissal for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). See *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007) (citing *Moir v. Greater Cleveland Reg 'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990)). Although the district court issued its decision in the context of a summary judgment motion, the court dismissed Perich's claim based on a lack of subject matter jurisdiction and did not reach the merits of the claim. In addition, this Circuit has treated the "ministerial exception" as jurisdictional in nature and an appropriate ground for a motion to dismiss pursuant to Rule 12(b)(1). *See id. See also Rweyemamu v. Cote*, 520 F.3d 198, 206 (2d Cir. 2008)

(noting that the circuits have taken different approaches in applying the ministerial exception, with the Third, Tenth, Ninth, and First Circuits treating the exception as an affirmative defense under Rule 1 2(b)(6),[2] the Sixth and Seventh Circuits interpreting the exception as jurisdictional under Rule 12(b)(1),[3] and the Eleventh and Fifth Circuits treating it as a mandate to interpret the discrimination laws not to apply to claims between ministers and their churches[4]). Accordingly, this Court should review the claim using the same analysis as it does for an order entered pursuant to Rule 12(b)(1).

In response to a Rule 12(b)(1) motion, the plaintiff bears the burden of proving jurisdiction. *Hollins*, 474 F.3d at 225. Furthermore, "unlike Rule 12(b)(6) analysis, under which the existence of genuine issues of material fact warrants denial of the motion to dismiss, 'the court is empowered to resolve factual disputes when subject matter jurisdiction is challenged.'" *Id.* (quoting *Moir*, 895 F.2d at 269). If the district court makes its jurisdictional ruling based on the resolution of both legal and factual disputes, this Court reviews the legal findings under

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[2] *See, e.g., Petruska v. Gannon Univ.*, 462 F.3d 294, 302 (3d Cir. 2006); *Bryce v. Episcopal Church in the Diocese*, 289 F.3d 648, 654 (10th Cir. 2002); *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 951 (9th Cir. 1999); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1578 (1st Cir. 1989).

[3] *See. e.g., Hollins*, 474 F.3d at 225; *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1039 (7th Cir. 2006).

[4] *See, e.g., Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1302-04 (11th Cir. 2000); *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972).

a *de novo* standard and the factual findings under a clearly erroneous standard. *See Gordon v. Gorno Bros., Inc.*, 410 F.3d 879, 881 (6th Cir. 2005); *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1135 (6th Cir. 1996).

Perich argues that no facts relevant to the determination of subject matter jurisdiction were in dispute and, thus, this Court should review *de novo* all of the district court's findings. Hosanna-Tabor argues the district court made a number of factual findings in determining that the court had no subject matter jurisdiction, including Hosanna-Tabor's status as a "religious institution" and Perich's status as a "minister" and "ministerial employee." Thus, according to Hosanna-Tabor, this Court should review these factual findings under the clearly erroneous standard.

The district court made both factual and legal findings in determining whether the court had subject matter jurisdiction. The district court's determinations concerning Perich's primary duties throughout her work day were factual. Accordingly, this Court must accept these factual findings unless they are clearly erroneous. *See EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 283 (5th Cir. 1981) (indicating that the district court's factual findings in support of its decision of which employees are ministers "must be accepted unless clearly erroneous"). However, its decision as to whether Perich classified as a ministerial employee remains a legal conclusion subject to *de novo* review. See *Starkman v. Evans*, 198 F.3d 173, 176 (5th Cir. 1999) ("[t]he status of employees as ministers . . . remains a legal conclusion for this court").

II. The ADA's Application to Religious Organizations

The ADA generally prohibits an employer with fifteen or more employees from discriminating against a qualified individual with a disability on the basis of that disability in regard to all conditions of employment. *See* 42 U.S.C. § 12111(5), § 12112(a). The retaliation provision of the ADA prohibits employers from "discriminat[ing] against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge . . . under [the ADA]." 42 U.S.C. § 12203(a).[5] Title I of the ADA includes an exception–known as the "ministerial exception"–which allows religious entities to give "preference in employment to individuals of a particular religion" and to "require that all applicants and employees conform to the religious tenants of such organization." 42 U.S.C. § 12113(d).

However, the legislative history makes clear that Congress intended the ADA to broadly protect employees of religious entities from retaliation on the job, subject only to a narrowly drawn religious exemption. The House Report provides the following illustrative hypothetical example:

> [A]ssume that a Mormon organization wishes to hire only Mormons to perform certain jobs. If a

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[5] Perich also brought a claim under the PDCRA, a Michigan law which essentially tracks the ADA. Resolution of a plaintiff's ADA claim would generally resolve her PDCRA claim as well. *See Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 634 n.3 (6th Cir. 1998). In view of how closely the anti- retaliation provision of the PDCRA tracks the anti-retaliation provision of the ADA, resolving Perich's ADA claim also resolves her PDRCA claim.

> person with a disability applies for the job, but is not a Mormon, the organization can refuse to hire him or her. However, if two Mormons apply for a job, one with a disability and one without a disability, the organization cannot discriminate against the applicant with the disability because of that person's disability.

H.R. Rep. No. 485 part 2, 101st Cong., 2d Sess. 76-77 (1990). *See also* 29 C.F.R. Pt. 1630, App. § 1630.16(a) ("Religious organizations are not exempt from title I of the ADA or [these regulations]. A religious [entity] may give a preference in employment to individuals of the particular religion, and may require that applicants and employees conform to the religious tenants of the organization. However, a religious organization may not discriminate against an individual who satisfies the permitted religious criteria because that individual is disabled. The religious entity, in other words, is required to consider qualified individuals with disabilities who satisfy the permitted religious criteria on an equal basis with qualified individuals without disabilities who similarly satisfy the religious criteria.").

III. The Ministerial Exception

The ministerial exception is rooted in the First Amendment's guarantees of religious freedom. *Hollins*, 474 F.3d at 225.

A. Interference in Church Governance

As applied by this Circuit, the doctrine "precludes subject matter jurisdiction over claims involving the employment relationship between a religious institution and its ministerial employees, based on the institution's constitutional right to be free from

judicial interference in the selection of those employees." *Id. See generally Serbian E. Orthodox Diocese for the United States & Can. v. Milivojevic*, 426 U.S. 696, 96 S. Ct. 2372, 49 L. Ed. 2d 151 (1976); *Lewis v. Seventh Day Adventists Lake Region Conference*, 978 F.2d 940 (6th Cir. 1992).

As the Fifth Circuit noted in *McClure v. Salvation Army*, one of the first cases to analyze the ministerial exception, "[t]he relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose." 460 F.2d at 55 8-59. *See also Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1167-68 (4th Cir. 1985) ("The right to choose ministers without government restriction underlies the well-being of religious community . . . for perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrine both to its own membership and to the world at large.").

While the ministerial exception was first applied in the context of suits brought against religious employers under Title VII, see *McClure*, 460 F.2d at 560, the exception has been extended to suits brought against religious employers under the ADA.[6] *See, e.g., Hollins*, 474 F.3d at 225; *Werft* v. *Desert Sw. Annual Conference of United Methodist Church*, 377 F.3d 1099, 1100 (9th Cir. 2004); *Starkman*, 198 F.3d at 175.

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[6] Courts have also extended the ministerial exception to suits brought under the ADEA, the common law, and state law. *See Hollins*, 474 F.3d at 225 (citing cases).

For the ministerial exception to bar an employment discrimination claim, two factors must be present: (1) the employer must be a religious institution, and (2) the employee must be a ministerial employee. *Hollins*, 474 F.3d at 225.

To qualify as a religious institution under the first prong, the employer need not be a traditional religious organization, such as a church, diocese, or synagogue, nor must it be an entity operated by a traditional religious organization. *Id.* Rather, a religiously affiliated entity is considered a religious institution if its "mission is marked by clear or obvious religious characteristics." *Id.* at 226 (citing *Shaliehsabou* v. *Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 310 (4th Cir. 2004)). This Circuit has applied the ministerial exception to a religiously affiliated hospital, and it has explicitly approved of applying the doctrine to religiously affiliated schools and corporations. *Id.* at 225.

To determine whether an employee is ministerial under the second prong, this Circuit has instructed courts to look at the function, or "primary duties" of the employee.[7] *Id.* at 226 (applying the exception to a resident in a Methodist Hospital's clinical pastoral education program). As a general rule, an employee

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[7] At least one other circuit has found that this approach is too rigid, adopting a standard that considers both the employee's primary function and the nature of the dispute to determine whether analyzing the claim would entangle the court in religious doctrinal disputes. *Rweyemamu*, 520 F.3d at 208. However, this Circuit has adopted a standard that focuses on the primary duties of the employee to determine whether that employee should be classified as ministerial. See *Hollins*, 474 F.3d at 226.

is considered a minister if "the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." Id. (quoting Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1545 (1979)). *See also Rayburn*, 772 F.2d at 1169. In extending the ministerial exception beyond ordained ministers, this Circuit has instructed courts to look at the function of the plaintiff's employment position rather than the fact of ordination. *Hollins*, 474 F.3d at 226. Other circuits have further instructed that courts must "determine whether a position is important to the spiritual and pastoral mission of the church." *See, e.g., Rayburn*, 772 F.2d at 1169.

The parties in the instant case do not dispute that "religious institutions" include religiously affiliated schools and that Hosanna-Tabor meets this requirement. Thus, the first requirement under the ministerial exception is present, and the primary issue is whether Perich served as a ministerial employee.

The question of whether a teacher at a sectarian school classifies as a ministerial employee is one of first impression for this Court. However, the overwhelming majority of courts that have considered the issue have held that parochial school teachers such as Perich, who teach primarily secular subjects, do not classify as ministerial employees for purposes of the exception. *See, e.g., Redhead v. Conference of Seventh Day Adventists*, 440 F. Supp. 2d 211, 221-222 (E.D.N.Y. 2006) (holding that a

teacher at a Seventh Day Adventist elementary school does not classify as a ministerial employee because her teaching duties were primarily secular and her daily religious duties "were limited to only one hour of Bible instruction per day"); *Guinan v. Roman Catholic Archdiocese of Indianapolis*, 42 F. Supp. 2d 849, 854 (S. D. Ind. 1998) (holding that a fifth grade teacher who taught at least one class in religion per term and organized Mass once a month at a religious elementary school was not a ministerial employee); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 172 (2d Cir. 1993) (holding that applying the ADEA to a math teacher at a religious high school would not result in excessive entanglement under the Establishment Clause); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392, 1397 (4th Cir. 1990) (holding that teachers at a religious school who integrated biblical material into traditional academic subjects should be considered lay teachers for purposes of the ministerial exception); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1370 (9th Cir. 1986) (holding that teachers at a church owned and operated school do not fulfill the function of a ministerial employee). *But see Clapper* v. *Chesapeake Conference of Seventh Day Adventists*, No. 97 CV 2648, 1998 WL 904528, at *1, 7 (Dec. 29, 1998) (holding that a former elementary school teacher at a school whose primary purpose was the salvation of each student's soul through indoctrination into Seventh Day Adventist theological beliefs classified as a ministerial employee).

By contrast, when courts have found that teachers classify as ministerial employees for purposes of the exception, those teachers have generally taught primarily religious subjects or had a

central role in the spiritual or pastoral mission of the church. *See, e.g., EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 463-65 (D.C. Cir. 1996) (holding that a nun whose primary duties were to teach canonical law at Catholic University and who was "entrusted with instructing students in the 'fundamental body of ecclesiastical laws' that governs the Church's sacramental life, defines the rights and duties of its faithful and the responsibilities of their pastors, and guides its administration" was a ministerial employee); *Sw. Baptist*, 651 F.2d at 283-84 (holding that seminary faculty were ministerial employees given that they served as "intermediaries between the [Baptist] Convention and the future ministers of many local Baptist churches," "instructed the seminarians in the 'whole of religious doctrine,' and [taught] only religious oriented courses").

The district court's factual determinations concerning Perich's primary duties throughout her work day were not clearly erroneous. The record supports the finding that Perich's employment duties were identical when she was a contract teacher and a called teacher and that she taught math, language arts, social studies, science, gym, art, and music using secular textbooks. Furthermore, the record indicates that Perich taught a religion class four days per week for thirty minutes and that she attended a chapel service with her class once a week for thirty minutes. Perich also led each class in prayer three times a day for a total of approximately five or six minutes. The record also indicates that Perich seldom introduced religion during secular discussions. Approximately twice a year, Perich led the chapel service in rotation with other teachers. However, teachers leading chapel or teaching

religion were not required to be called or even Lutheran, and, in fact, at least one teacher was not. In all, the record supports the district court's finding that activities devoted to religion consumed approximately forty- five minutes of the seven hour school day.

However, given these factual findings relating to Perich's primary duties, the district court erred in its legal conclusion classifying Perich as a ministerial employee. Perich spent approximately six hours and fifteen minutes of her seven hour day teaching secular subjects, using secular textbooks, without incorporating religion into the secular material. *Cf. Clapper*, 1998 WL 904528, at *2 (finding that an elementary school teacher's primary duties were religious where he taught the Bible's story of creation in science class and the influence of religion on the events of history in social studies class). Thus, it is clear that Perich's primary function was teaching secular subjects, not "spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." *Hollins*, 474 F.3d at 226. (internal citation omitted) *See also EEOC v. Miss. Coll.*, 626 F.2d 477, 485 (5th Cir. 1980) ("The College's faculty and staff do not function as ministers. The faculty members are not intermediaries between a church and its congregation. They neither attend to the religious needs of the faithful nor instruct students in the whole of religious doctrine.").

The fact that Perich participated in and led some religious activities throughout the day does not make her primary function religious. *See Guinan*, 42 F. Supp. 2d at 852 (finding that although the teacher

did participate in some religious activities, "it cannot be fairly said that she functioned as a minister or a member of the clergy"). This is underscored by the fact that teachers were not required to be called or even Lutheran to conduct these religious activities, and at least one teacher at Hosanna-Tabor was not Lutheran. *See* at 852-53 ("the secular nature of [the teacher's] position is underscored by the fact that [the church] did not require teachers at [the school] to be Catholic, and, as a matter of fact, some were not Catholic").

In addition, that Hosanna-Tabor has a generally religious character–as do all religious schools by definition–and characterizes its staff members as "fine Christian role models" does not transform Perich's primary responsibilities in the classroom into religious activities. *See Miss. Coll.*, 626 F.2d at 485 ("That faculty members are expected to serve as exemplars of practicing Christians does not serve to make the terms and conditions of their employment matters of church administration and thus purely of ecclesiastical concern."). This is underscored by the fact that Perich can only recall twice in her career when she introduced the topic of religion during secular discussions.[8] *Cf. Clapper*, 1998 WL 904528, at *7 (finding that an elementary school teacher's primary duties were religious where the academic curriculum in traditionally secular subjects "incorporate[d] the teachings of the Seventh-day

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[8] While Defendant cites a quote from Perich in which she says that the educational ministry is special "because the teacher can bring God into every subject," the record supports the district court's finding that only twice did Perich bring religion into otherwise secular subjects.

Adventist Church whenever possible"). Similarly, Perich's extra religious training as a result of completing her colloquy did not affect the duties she performed in the classroom on a daily basis. *See Guinan*, 42 F. Supp. 2d at 850 (finding that a teacher whose training as a Catechist permitted her to teach religion classes was not a ministerial employee).

In finding that Perich was a ministerial employee, the district court relied largely on the fact that Hosanna-Tabor gave Perich the title of commissioned minister and held her out to the world as a minister by bestowing this title upon her. However, the *title* of commissioned minister does not transform the *primary duties* of these called teachers from secular in nature to religious in nature. *See Sw. Baptist*, 651 F.2d at 285 (holding that certain employees, "though considered ministers by the Seminary, are not ministers" under the ministerial exception). The governing primary duties analysis requires a court to objectively examine an employee's actual job function, not her title, in determining whether she is properly classified as a minister. In this case, it is clear from the record that Perich's primary duties were secular, not only because she spent the overwhelming majority of her day teaching secular subjects using secular textbooks, but also because nothing in the record indicates that the Lutheran church relied on Perich as the primary means to indoctrinate its faithful into its theology. *See Clapper*, 1998 WL 904528, at *7 (warning that courts should examine not only the relative quantity of time an employee spends on religious versus secular activities, but also "the degree of the church entity's reliance upon such employee to indoctrinate persons into its theology"). By contrast, in *Clapper*, the

defendant schools envisioned their teachers as having a primarily religious role. The teachers were required to be "tithe paying members of the Seventh-day Adventist Church and are expected to participate in church activities, programs, and finances." See *Clapper*, 1998 WL 904528, at *2. The Fourth Circuit observed that "[t]he purpose of this requirement is obvious–the Chesapeake Conference desires to insure that the minds of its youth are shaped by model members of the Seventh-day Adventist faith." *Id.* at *7.

Furthermore, the district court in the instant case found that the primary duties of called teachers are identical to those of contract teachers, who do not have the title of minister, and at least one contract teacher who taught at the school was not Lutheran. Given the undisputed evidence that all teachers at Hosanna-Tabor were assigned the same duties, a finding that Perich is a "ministerial" employee would compel the conclusion that all teachers at the school–called, contract, Lutheran, and non-Lutheran–are similarly excluded from coverage under the ADA and other federal fair employment laws. However, the intent of the ministerial exception is to allow religious organizations to prefer members of their own religion and adhere to their own religious interpretations. Thus, applying the exception to non-members of the religion and those whose primary function is not religious in nature would be both illogical and contrary to the intention behind the exception.

B. Interpretation of Church Doctrine

In addition to being motivated by the concern of government interference in church governance, the

ministerial exception is also motivated by the concern "that secular authorities would be involved in evaluating or interpreting religious doctrine." *Tomic*, 442 F.3d at 1039 (quoting *Combs v. Central Texas Annual Conference of United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999)).

In the instant case, Hosanna-Tabor has attempted to reframe the underlying dispute from the question of whether Hosanna-Tabor fired Perich in violation of the ADA to the question of whether Perich violated church doctrine by not engaging in internal dispute resolution. However, contrary to Hosanna-Tabor's assertions, Perich's claim would not require the court to analyze any church doctrine; rather a trial would focus on issues such as whether Perich was disabled within the meaning of the ADA, whether Perich opposed a practice that was unlawful under the ADA, and whether Hosanna-Tabor violated the ADA in its treatment of Perich. As Plaintiff notes, the LCMS personnel manual, which includes EEOC policy, and the Governing Manual for Lutheran Schools clearly contemplate that teachers are protected by employment discrimination and contract laws. In addition, none of the letters that Hosanna-Tabor sent to Perich throughout her termination process reference church doctrine or the LCMS dispute resolution procedures.

Furthermore, this Court would not be precluded from inquiring into whether a doctrinal basis actually motivated Hosanna-Tabor's actions. *See, e.g., Geary v. Visitation of Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 329 (3d Cir. 1993) (finding that the First Amendment did not preclude the court from "determin[ing] whether the religious reason

stated by [the school] actually motivated the dismissal"); *DeMarco*, 4 F.3d at 171 (noting that a court can conduct an "inquiry . . . directed toward determining whether the articulated purpose is the actual purpose for the challenged employment-related action" without "calling into question the value or truthfulness of religious doctrine").

CONCLUSION

Because the ministerial exception does not bar Perich's claims against Hosanna- Tabor, we **VACATE** the district court's order entering summary judgment on behalf of Defendant and **REMAND** with instructions that the district court make a finding on the merits of Perich's retaliation claim under the ADA.

CONCURRENCE

HELENE N. WHITE, Circuit Judge, concurring. I agree that the ministerial exception[1] does not bar this ADA action. I write separately because I read the relevant cases as more evenly split than does the majority.

As the majority notes, whether a teacher at a sectarian school is properly characterized as a ministerial employee is an issue of first impression for this Court.[2] A number of courts have concluded

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[1] It is worth clarifying that "the ministerial exception" is fundamentally distinct from the statutory exceptions in federal antidiscrimination laws like the ADA and Title VII. See Douglas Laycock, *A Syllabus of Errors*, 105 Mich. L. Rev. 1169, 1181-82 (2007) (book review). The statutory exception to the ADA allows religious entities to "giv[e] preference in employment to individuals of a particular religion" and to "require that all applicants and employees conform" to the organization's religious tenets. 42 U.S.C. § 12113(d). The statutory exception only covers religious discrimination, but it applies to any employee of a religious entity. *See* Laycock at 1182. In contrast, the ministerial exception is a separate judge-made exception rooted in the First Amendment designed to allow religious organizations to hire and fire religious leaders according to any criteria they choose. *See id.* at 1181; *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007). The ministerial exception is broad – it covers any kind of discrimination – but applies only to religious leaders, or those whose duties are "ministerial." *See* Laycock at 1182.

[2] Courts have struggled in determining the proper application of the ministerial exception to teachers at religious schools. A student note points out that application of the primary-duties test has created split authority in several areas, including regarding parochial school teachers. *See* Note, *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 Harv. L. Rev. 1776, 1788 (2008). And several courts have recognized the lack of uniformity in this

that parochial school teachers are not ministerial employees for purposes of the exception. *See, e.g., DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 171-72 (2d Cir. 1993); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1370 (9th Cir. 1986); *Redhead v. Conf. of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 22 1-22 (E.D.N.Y. 2006); *Guinan v. Roman Catholic Archdiocese of Indianapolis*, 42 F. Supp. 2d 849, 852-54 (S.D. Ind. 1998); see also *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1396-97 (4th Cir. 1990).[3] In contrast, courts have found teachers to be ministerial employees where the teachers have

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area. *See Rweyemamu v. Cote*, 520 F.3d 198, 208 (2d Cir. 2008) ("Circuit courts applying the ministerial exception have consistently struggled to decide whether or not a particular employee is functionally a 'minister.'"); *Coulee Catholic Sch. v. Labor and Indus. Rev. Comm.*, 768 N.W.2d 868, 881 (Wis. 2009) (explaining contrasting ways in which courts have interpreted primary-duties test); *Weishuhn v. Catholic Diocese of Lansing*, 756 N.W.2d 483, 492-93 (Mich. App. 2008) (listing cases in which ministerial exception has been applied to teachers, and cases in which it has not). *See also* Petition for Writ of Certiorari, *Archdiocese of Washington v. Moersen*, 128 S. Ct. 1217, 2007 WL 2681957 at *15 (No. 07-0323) (Sept. 7, 2007) ("teachers at church-related schools have been included within the ministerial exception by some courts and excluded by others"). The Supreme Court has declined to weigh in on the issue. See *Moersen*, 128 S. Ct. 1217 (2008) (mem.); *The Ministerial Exception*, *supra*, at 1776 n.3 (noting certiorari denials in 2006 and 2007).

[3] The majority cites *Dole* for the original proposition that parochial school teachers are not ministerial employees for purposes of the ministerial exception. However, *Dole* addresses whether a specific statutory exception applies. See *id.* at 1396-97. (evaluating whether teachers are ministers for purposes of statutory exception from the definition of "employees" in the Fair Labor Standards Act).

taught religious subjects and/or had a key role in the religious mission of the church. *See Clapper v. Chesapeake Conference of Seventh Day Adventists*, 166 F.3d 1208, 1998 WL 904528, at *1, 7 (4th Cir. Dec. 29, 1998) (unpublished); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 463-65 (D.C. Cir. 1996); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 283-84 (5th Cir. 1981); *Coulee Catholic Sch. v. Labor and Indus. Rev. Comm.*, 768 N.W.2d 868 (Wis. 2009).

Of these cases, four present situations similar to that here — plaintiff teachers who taught primarily secular subjects at a religious school and court decisions turning on a primary-duties analysis. Two plaintiffs were not found to be ministerial employees. *See Redhead*, 440 F. Supp. 2d at 22 1-22 (teacher at Seventh-day Adventist elementary school teaching secular subjects and daily Bible study not a ministerial employee because teaching duties were "primarily secular" and religious duties "were limited to only one hour of Bible instruction per day and attending religious ceremonies with students only once per year"); *Guinan*, 42 F. Supp. 2d at 852-53 (fifth-grade teacher teaching mostly secular courses along with one class in religion and organized Mass once a month not a ministerial employee; secular nature of the teaching position demonstrated by the fact that some teachers were not Catholic). Two plaintiffs were found to be ministerial employees. *See Clapper*, 1998 WL 904528, at *1, *7 (elementary school teacher teaching traditional academic curriculum who also led students in prayer and taught the Bible on a daily basis is a ministerial employee; court rejected argument that only one of teacher's thirteen responsibilities was explicitly

religious, relying on the fact that the church's code made clear that the "the primary purpose of the Seventh-day Adventist elementary education" is the redemption of students' souls through belief in and adherence to Seventh-day Adventist beliefs); *Coulee*, 768 N.W.2d at 88 1-82 (in applying primary-duties test, state supreme court eschewed quantitative analysis of time spent on tasks in favor of functional approach focusing on whether organization has a fundamentally religious mission and how important or closely tied the employee's work is to the fundamental mission, concluding plaintiff's teaching Catholic doctrine and practice to students four days a week occupied a role "of high importance and closely linked to the mission of the school – the inculcation of a Christ-centered concept of life.").

Perich's daily duties resemble to some extent those of the plaintiffs in each of these cases, including those in which the courts found the plaintiffs' "primary duties" to be ministerial in nature. Tipping the scale against the ministerial exception in this case is that, as the majority points out, there is evidence here that the school itself did not envision its teachers as religious leaders, or as occupying "ministerial" roles. HosannaTabor's teachers are not required to be called or even Lutheran to teach or to lead daily religious activities. The fact that the duties of the contract teachers are the same as the duties of the called teachers is telling. This presence (or lack) of a predominantly religious yardstick for qualification as a teacher is a key factor in decisions finding the ministerial exception applicable and those finding it inapplicable alike. *See Clapper*, 1998 WL 904528 at *2, *7 (4th Cir. 1998) (applying ministerial exception) (noting

that teachers are required to be "tithe paying members of the Seventh-day Adventist Church and are expected to participate in church activities, programs, and finances" and "The purpose of this requirement is obvious-the Chesapeake Conference desires to insure that the minds of its youth are shaped by model members of the Seventh-day Adventist faith."); *Coulee*, 768 N.W.2d at 891 (applying ministerial exception) (court found that the plaintiff teacher was "required to live, embody, and teach Catholicism in her role as a teacher consistent with the mission of the school" where teacher was required to "engage in Catholic worship, model Catholic living, and impart Catholic teaching," even though not required to be a Catholic); *Guinan*, 42 F. Supp. 2d at 852-53 (S.D. Ind. 1998) (ministerial exception does not apply) ("the secular nature of [the teacher's] position is underscored by the fact that the Archdiocese did not require teachers at [the school] to be Catholic and, as a matter of fact, some were not Catholic.")

By this measure, even courts that have found ministerial plaintiffs who have daily schedules that have roughly the same ratio of religious to non-religious activities as Perich would find that the ministerial exception should not apply here.

For the reasons above, I concur.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

v.

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,
Defendant,

and

CHERYL PERICH,
Plaintiff/Intervenor,

v.

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,
Defendant.

Case No. 07-14124
Honorable Patrick J. Duggan

OPINION AND ORDER

At a session of said Court, held in the U.S. District Courthouse, Eastern District of Michigan, on October 23, 2008.

PRESENT: THE HONORABLE
PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

This action arises from Plaintiff/Intervenor Cheryl Perich's ("Perich") employment relationship with Defendant Hosanna-Tabor Evangelical Lutheran Church and School ("Hosanna-Tabor"). Hosanna-Tabor officially terminated Perich from her teaching position on April 11, 2005. On May 17, 2005, Perich filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging that Hosanna-Tabor had discriminated and retaliated against her in violation of the Americans with Disabilities Act ("ADA"). The EEOC brought suit against Hosanna-Tabor for retaliation against Perich on September 28, 2007. Perich later intervened as a plaintiff raising the same federal retaliation claim as the EEOC and adding a second retaliation claim under Michigan state law. Presently before the Court are Hosanna-Tabor's motions for summary judgment on all claims as well as Perich's motion for summary judgment which has been joined by the EEOC. The motions have been fully briefed and a hearing was held on September 25, 2008. For the reasons set forth below, the Court grants Hosanna-Tabor's motions for summary judgment.

I. Factual and Procedural Background

Hosanna-Tabor is a religious school that teaches kindergarten through eighth grades. Hosanna-Tabor's faculty consists of two types of teachers: "lay" or "contract" teachers and "called" teachers. A contract teacher is hired by the Board of Education for a one year term and must renew the contract each year to continue in Hosanna-Tabor's employment. In contrast, a called teacher is hired by the voting members of the Hosanna-Tabor Lutheran Church congregation on the recommendation of the Board of Education, Board of Elders, and Board of Directors. To be eligible for a "call," a teacher must complete "colloquy" classes as required by the Lutheran Church-Missouri Synod that focus on various aspects of the Christian faith. After completing the colloquy, the teacher receives a certificate of admission into the teaching ministry and the Michigan District of the Lutheran Church-Missouri Synod will assist the teacher in finding employment by placing the teacher's name on a list of teachers that is distributed to schools in need.

Once selected by a church congregation, a called teacher obtains the title of "commissioned minister." Called teachers are hired on an open ended basis and cannot be summarily dismissed without cause. Finally, called teachers have the opportunity to claim a special housing allowance on their income taxes provided they are conducting activities "in the exercise of ministry." (Def.'s Mot. for Partial Sum. J., Ex. Q.)

In July 1999, Hosanna-Tabor hired Perich as a contract teacher to teach kindergarten for the upcoming school year. Perich had previously been employed at other Lutheran schools and had already begun pursuing her "call" by attending colloquy classes at Concordia College. Perich completed her colloquy in February 2000 and received her call from the Hosanna-Tabor Lutheran Church on March 29, 2000.[1] From then until her termination, Perich was listed as a commissioned minister in the Lutheran Church-Missouri Synod. At least once during this time, Perich claimed the housing allowance on her taxes.

After receiving her call, Perich's employment continued unchanged in form from her time as a contract teacher. During her years with Hosanna-Tabor, Perich taught math, language arts, social studies, science, gym, art, and music. In addition, Perich taught a religion class for thirty minutes a day four days a week and attended a chapel service with her class for about thirty minutes once a week. About twice a year, Perich led the chapel service in rotation with other teachers. Hosanna-Tabor does not require that teachers leading chapel or teaching religion be "called" or even Lutheran. Perich also led her classes in prayer three times a day for a total of five or six minutes and, at least during her final year as a teacher at Hosanna-Tabor, Perich's class engaged in a devotional for five to ten minutes each morning. In all, however, activities devoted to

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[1] The parties have not indicated what classes Perich took to complete her colloquy but agree that she took courses at Concordia College that satisfied the requirements for called teachers set forth by the Lutheran Church-Missouri Synod.

religion consumed only about forty-five minutes of the seven-hour school day.

Nonetheless, Hosanna-Tabor's website indicates that it provides a "Christ-centered education" that helps parents by "reinforcing biblical principals [sic] and standards." Hosanna-Tabor also characterizes its staff members as "fine Christian role models who integrate their faith into all subjects." Perich notes, however, that secular school subjects were taught with textbooks commonly used in public education and that she can only recall twice in her career when she introduced the topic of religion during otherwise secular discussion.

Perich's employment with Hosanna-Tabor went without incident for several years. In the summer of 2004, however, Perich became suddenly ill at a Hosanna-Tabor golf outing. As her doctor struggled to find the right diagnosis, Perich agreed with Hosanna-Tabor administrators that it would be best that she go on disability leave for the 20042005 school year. Perich officially went on disability leave in August. During the period she was on disability, Perich provided regular updates to Hosanna-Tabor's principal, Stacy Hoeft.

On December 16, 2004, Perich informed Hoeft via email that her doctor had finally confirmed a diagnosis of narcolepsy and that she would be able to return to work in two to four months once she was stabilized on medication. On January 10, 2005, Hoeft informed Perich of Hosanna-Tabor's decision to hire a substitute teacher to work in Perich's absence. Until that time, another teacher had been teaching three grade levels at once to cover for Perich but the arrangement was no longer feasible. In anticipation

of the 2005-2006 school year, Hoeft requested on January 19 that Perich begin considering and discussing with her doctor what she would be able to do upon return. Perich responded the same day that she would be fully functional with the assistance of medication. Perich reiterated this sentiment with additional explanation on January 21.

Also on January 21, Hoeft informed Perich of the school board's intent to amend the employee handbook to request that employees on disability for more than six months resign their calls to allow Hosanna-Tabor to responsibly fill their positions. Such resignations would not prevent employees from later pursuing reinstatement of their calls upon return to health. Perich had been on disability for over five months at the time she received this email.

On January 27 Perich informed Hoeft that she would be able to return to work between February 14 and February 28. Hoeft responded with surprise to Perich's email because, only days before, Perich had disclosed that she was unable to fill out her disability forms because of her condition. Hoeft feared that Perich's condition would jeopardize the safety of the students in her care. Hoeft also expressed concern about forcing students to adjust to a third teacher in one academic year. Three days later at a voter's meeting for the Hosanna-Tabor Church, school administrators opined that Perich would not be able to return to teaching that school year or the next. Based on this and other considerations, the congregation voted to request that Perich accept a peaceful release agreement wherein Perich would resign her call in exchange for the congregation paying for a portion of her health insurance

premiums for the remainder of the calendar year. On February 7, the school board selected Scott Salo, chairman of the board, to discuss this proposal with Perich.

On February 8 Perich's doctor gave her a written release to return to work without restrictions on February 22. The next day, Salo contacted Perich to arrange a meeting to discuss her employment. Perich instead requested to meet with the entire school board and the meeting was scheduled for February 13. At that meeting, the board presented the peaceful release proposal and Perich responded by presenting her work release note. Despite the doctor's note, the board remained concerned about Perich's ability to supervise students for an entire school day. Perich explained that she needed to return to work because, as of her doctor's release on February 22, she would no longer be eligible for disability coverage. The board, however, continued to request that Perich resign and asked her to email her decision by February 21.

Shortly after nine at night on February 21, Perich emailed Hoeft to inform her that she would not resign from her position and would be at school to resume her job in the morning. The next day there was no job for Perich to return to upon her arrival at Hosanna-Tabor. Perich, however, refused to leave school grounds until she received a letter acknowledging that she appeared for work because the Hosanna-Tabor employee handbook states that failure to return to work on the first day following the expiration of an approved medical leave is viewed as a voluntary termination. Perich subsequently received a letter from Hoeft and Salo indicating that

she had provided improper notification of her return to work and requesting that she continue her leave. Perich then left the premises.

Hoeft and Perich spoke again that day over the phone; Hoeft indicated that Perich would likely be fired and Perich indicated that she would assert her legal rights against discrimination and asked Hoeft to pass that information along to the boards. Perich also emailed Hoeft and stated that her doctor had reaffirmed that she was healthy and ready to work. In a letter dated February 22, however, the Board of Education described Perich's conduct as "regrettable" and indicated that they would be reviewing the process of rescinding her call on account of her disruptive behavior.

On March 19, the Board of Education sent Perich a second letter stating that they would request that her call be rescinded at the voter's meeting of the Hosanna-Tabor Church on April 10. The cited reasons for this action included Perich's "insubordination and disruptive behavior" on February 22. The board also felt that Perich had "damaged beyond repair" her working relationship with Hosanna-Tabor by "threatening to take legal action." The Hosanna-Tabor Constitution and By-Laws allow the congregation to depose a "Pastor or duly Called Professional Minister" for, among other reasons, "[w]illful neglect of official duties without cause" or "[e]vident and protracted incapacity to perform the functions of the sacred office." Three-fourths approval of the voting members present at a meeting is required for such action. After informing Perich of this procedure, the March 19 letter went on to reinstate the peaceful release offer originally

proposed on February 13. Perich was given until April 8 to accept the offer.

On March 21 Perich's legal counsel sent a letter to Hosanna-Tabor's legal counsel suggesting that Hosanna-Tabor's actions amounted to unlawful disability discrimination. Perich's counsel implored Hosanna-Tabor to seek a peaceful resolution to the matter before Perich was forced to file a complaint with the EEOC or institute a law suit. Nonetheless, on April 10, 2005, the voting members of the Hosanna-Tabor Lutheran Church congregation voted to rescind Perich's call. Perich was informed by letter the next day. Perich responded by filing a charge of discrimination and retaliation with the EEOC on May 17.

On September 28, 2007, the EEOC filed a complaint against Hosanna-Tabor alleging one count of retaliation in violation of the ADA. Perich moved to intervene on March 11, 2008. Perich's motion was granted on April 10, 2008, and Perich filed a complaint against Hosanna-Tabor on the same day. Perich's complaint includes one count of retaliation under the ADA and one count of retaliation under Michigan's Persons with Disabilities Civil Rights Act ("PDCRA"). Presently before the Court are motions for summary judgment from all parties on all counts. The issues presented include the applicability of the "ministerial exception," the timeliness of Perich's PDCRA claim, and the existence of direct and circumstantial evidence of retaliation by Hosanna-Tabor because Perich threatened legal action.

II. Standard of Review

Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c). The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512 (1986). After adequate time for discovery and upon motion, Rule 56(c) mandates summary judgment against a party who fails to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986).

The movant has an initial burden of showing "the absence of a genuine issue of material fact." *Id.* at 323. Once the movant meets this burden, the non-movant must come forward with specific facts showing that there is a genuine issue for trial. *See Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986). To demonstrate a genuine issue, the non-movant must present sufficient evidence upon which a jury could reasonably find for the non-movant; a "scintilla of evidence" is insufficient. See *Liberty Lobby*, 477 U.S. at 252, 106 S. Ct. at 2512.

The court must accept as true the non-movant's evidence and draw "all justifiable inferences" in the non-movant's favor. *See id.* at 255. The inquiry is whether the evidence presented is such that a jury applying the relevant evidentiary standard could

"reasonably find for either the plaintiff or the defendant." *See id.*

III. The "Ministerial Exception"

Along with its prohibition of discrimination on the basis of race, color, religion, sex, and national origin, Title VII of the Civil Rights Act of 1964 contains a "ministerial exception" allowing religious employers to prefer members of their own faith for certain positions. 42 U.S.C. §§ 2000e-1(a) to 2000e-1(a). Although this exception specifically allows discrimination only on the basis of religion, courts have interpreted the First Amendment to require that religious employers be permitted even more liberty in their employment decisions and have therefore extended the exception to discrimination against other protected classes. *See, McClure v. Salvation Army,* 460 F.2d 553, 560 (5th Cir. 1972); *Hollins v. Methodist Healthcare, Inc.,* 474 F.3d 223, 225 (6th Cir. 2007). The same reasoning makes the ministerial exception applicable to claims made under the ADA. *Hollins,* 474 F.3d at 225. Furthermore, the Michigan Court of Appeals recently acknowledged that the ministerial exception, as understood in federal law, applies to discrimination claims made against religious employers in Michigan. *Weishuhn v. Catholic Diocese of Lansing,* — N.W.2d —, 279 Mich. App. 150, 2008 Mich. App. LEXIS 1073, at *1 (Mich. Ct. Appl. May 22, 2008).

Where the ministerial exception applies, it deprives federal courts of subject matter jurisdiction and bars the plaintiff's claims. *Hollins,* 474 F.3d at 224-25. The exception does not apply, however, to all claims made against religious employers. "In order for the ministerial exception to bar an employment

discrimination claim, the employer must be a religious institution and the employee must have been a ministerial employee." *Id.* at 225. For purposes of the ministerial exception, "religious institutions" includes religiously affiliated schools, *see id.*, and the parties do not dispute that Hosanna-Tabor meets this requirement. Therefore, the primary issue is whether Perich served as a ministerial employee.

A. Ministerial Employees

An employee's status under the ministerial exception is a legal conclusion that rests with the court. *Starkman v. Evans*, 198 F.3d 173, 176 (5th Cir. 1999). Although the exception most clearly applies to clergy and ordained ministers, it is not limited to such employees. *Hollins*, 474 F.3d at 226; *Rosati v. Toledo, Ohio Catholic Diocese*, 233 F. Supp. 2d 917, 921 (N.D. Ohio 2001). To determine if other employees fall within the exception, courts consider whether "the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." *Hollins*, 474 F.3d at 226 (quoting *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985)). Accordingly, an employee may be considered ministerial, although not ordained, depending on the function and actual role of his or her position in the religious institution. *Id.*; *Starkman*, 198 F.3d at 176-77 (5th Cir. 1999). "This approach necessarily requires a court to determine whether a position is important to the spiritual and

pastoral mission of the church . . . ." *Rayburn*, 772 F.2d at 1169.[2]

Despite widespread consensus about how to identify ministerial employees, the courts remain sharply divided about what positions fit the criteria. *See* Note, *The Ministerial Exception to Title VII: The*

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[2] At the September 25, 2008, hearing on these motions, defense counsel asserted that this Court need not apply the "primary duties" test to the present case because Perich's position as a "Commissioned Minister" automatically makes her a ministerial employee. Plaintiff's counsel countered that there is a distinction between "ordained" and "commissioned" ministers and that the exception applies automatically only to the former.

Ordained or not, interference with a religious institution's employment decisions regarding what they have labeled "commissioned" ministers threatens the religious freedom guaranteed by the First Amendment. In Rayburn, the Fourth Circuit explained, "'The right to choose ministers without government restriction underlies the well-being of religious community,'" and further held, "Where the values of state and church clash or where there is a differing emphasis among priorities or as to means in an employment decision of a theological nature, the church is entitled to pursue its own path without concession to the views of a federal agency or commission." 772 F.2d at 1167, 1171 (emphasis added). It is this Court's opinion, then, that Hosanna-Tabor is entitled deference in its decision to treat Perich as a minister even though the EEOC argues otherwise.

Nonetheless, this Court acknowledges that it was the *Rayburn* Court that first used the primary duties test and that the only other known case to deal with a "commissioned" minister did the same. *Rayburn*, 772 F.2d at 1169; *Clapper v. Chesapeake Conference of Seventh Day Adventists*, No. 97-2648, 166 F.3d 1208 (table), 1998 WL 904528 (4th Cir. Dec. 29, 1998). Therefore, this Court proceeds with an analysis of the primary duties test but considers Perich's title relevant to identifying the precise contours of her "primary duties."

Case for a Deferential Primary Duties Test, 121 Harv. L. Rev. 1776, 1787-88 (2008) ("[J]udicial evaluations of the role of employees–from parochial school teachers to church organists–has not created any discernibly consistent pattern." (footnotes omitted)); Janet S. Belcove-Shalin, *Ministerial Exception and Title VII Claims: Case Law Grid Analysis*, 2 Nev. L.J. 86, 115 ("Applying these guidelines to specific cases has not yielded consistent results."). In fact, there are courts on both sides of the issue when it comes to elementary school teachers in religious schools.

Several courts considering the employment status of teachers in religious schools have concluded that, when those teachers primarily teach secular subjects, the ministerial exception does not apply. *Redhead v. Conference of Seventh Day Adventists*, 440 F. Supp. 2d 211, 221-22 (E.D.N.Y. 2006); *Guinan v. Roman Catholic Archdiocese of Indianapolis*, 42 F. Supp. 2d 849, 854 (S.D. Ind. 1998). *Redhead* and *Guinan* involved fifth grade elementary school teachers whose daily schedules included teaching religion but who primarily taught secular subjects. *Redhead*, 440 F. Supp. 2d at 214; *Guinan*, 42 F. Supp. 2d at 850, 852. Beyond teaching religion for one hour a day, Redhead attended a worship service with her students only once a year. 440 F. Supp. 2d at 214. Guinan, meanwhile, organized Mass for the students once a month and was only permitted to teach religion by virtue of the fact that she qualified as a "catechist"–meaning she was a "teacher of Christianity."[3] 42 F. Supp. 2d at 850. Despite their

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[3] Guinan, in particular, qualified as a Catechist because she attended a Catholic college and took eighteen hours of theology.

religious responsibilities, the *Redhead* and *Guinan* courts refused to find that the women were "ministerial" employees. The *Guinan* court explained its decision by noting that "[t]he vast majority of Guinan's duties involved her teaching secular courses," that "the Archdiocese did not require teachers at [the school] to be Catholic," and that "the application of the ministerial exception to non-ministers has been reserved generally for those positions that are, at the very least, close to being exclusively religious based . . . ." *Id.* at 852-53. The Redhead court similarly focused on the fact that Redhead's religious activities "were limited to only one hour of Bible instruction per day and attending religious ceremonies with students only once per year." 440 F. Supp. 2d at 221.

The *Guinan* opinion also relied on the Second Circuit's analysis in *DeMarco v. Holy Cross High School.* 4 F.3d 166 (2d Cir 1993). Although it discusses the issue in the context of the First Amendment rather than specifically defining the "ministerial exception," *DeMarco* presents one of the few circuit court opinions to address the application of employment discrimination laws to teachers at religious schools. Ultimately the court concluded that analyzing a Catholic high school math teacher's age discrimination claim would not violate the First Amendment even though that teacher was responsible for leading students in prayer and taking them to Mass. *Id.* at 172. Important to the decision, however, was the fact that the defense asserted by the school–that DeMarco failed to begin class with

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42 F. Supp. 2d at 850 n.2. The threshold requirements for a Catechist, however, were not explored by the court.

prayer and attend Mass with his students–only required resolution of a factual dispute:

> Given that the religious duties that DeMarco allegedly failed to carry out are easily isolated and defined, we are confident that the able district judge will be able to focus the trial upon whether DeMarco was fired because of his age or because of failure to perform religious duties, and that this can be done without putting into issue the validity or truthfulness of Catholic religious teaching.

Id. Adjudication of this type of factual dispute, according to the Second Circuit, does not result in excessive entanglement of government and religion. *Id.*[4]

In sharp contrast to the aforementioned cases, however, is the Fourth Circuit's unpublished opinion in *Clapper v. Chesapeake Conference of Seventh Day Adventists*, No. 97-2648, 166 F.3d 1208 (table), 1998 WL 904528 (4th Cir. Dec. 29, 1998). There, the Fourth Circuit focused on the school's mission of obtaining "the salvation of each student's soul

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[4] The Third Circuit came to a similar conclusion in *Geary v. Visitation of the Blessed Virgin Mary Parish School*. 7 F.3d 324, 330 (3d Cir. 1993) ("A conclusion that the religious reason did not in fact motivate dismissal would not implicate entanglement since that conclusion implies nothing about the validity of the religious doctrine or practice and, further, implies very little even about the good faith with which the doctrine was advanced to explain the dismissal."). The Third Circuit went on to warn, however, that "the First Amendment dictates that a plaintiff may not challenge the validity, existence or 'plausibility' of a proffered religious doctrine, and we caution that the ADEA would not apply in such a case." *Id.*

through his or her indoctrination in Seventh-day Adventist theological beliefs." *Id.* at *1. In accord with this mission, the school's education code required "that the beliefs and practices of every teacher employed by the Chesapeake Conference be in complete harmony with the beliefs and practices of the Seventh-day Adventist Church." *Id.* at *2. Teachers were required to be tithe paying members of the church, were expected to participate in church activities, and were paid up to thirty percent of their salaries by church tithes.[5] Additionally, the education code required teachers to "[l]ook upon Christian teaching as a holy vocation" and awarded "a 'Commissioned Ministry of Teaching Credential' to its full-time elementary school teachers who, although they may not have undergone formal ministerial training, have demonstrated great experience and spiritual commitment to the Church." *Id.* at *3.

Like the case before this Court, the plaintiff in *Clapper* had obtained his Commissioned Ministry of Teaching Credential and engaged in various religious activities with his students throughout the school day. *Id.* Clapper's daily routine included leading his students in prayer three times a day and any time upon request, conducting worship for about ten minutes a day, teaching Bible as part of the school

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[5] At the September 25, 2008, hearing, defense counsel indicated that up to 50% of Hosanna-Tabor's funding–which is then used to pay teacher salaries–comes directly from the tithes and offerings of church members. Although there is no particular reason to doubt this statement, the Court cannot find support for it in the record and therefore does not place heavy reliance upon it.

curriculum, and engaging the students in the practice of witnessing, "which encourages them to apply their faith in a practical way." *Id.* When appropriate, Clapper also integrated church theology into the secular portions of the academic curriculum. *Id.*

Based on these facts, the Fourth Circuit concluded that Clapper was a ministerial employee and, therefore, that his employment discrimination claim was barred by the ministerial exception. *Id.* at *8. The court was not persuaded by Clapper's "attempts to downplay the ministerial nature of his former teaching positions at [the school] by asserting that the time he spent instructing his students in Bible and leading them in worship constituted only 10.6 percent of his work week." *Id.* at *4. The court refused to reduce the primary duties test to "a purely quantitative test" but rather opined that:

> While the relative quantity of time an employee of a religious entity spends directly teaching and spreading the faith, providing church governance, supervising a religious order, or supervising or participating in religious ritual and worship is important in determining whether those activities are the primary duties of such employee, the degree of the church entity's reliance upon such employee to indoctrinate persons in its theology is equally important.

Id. at *7. Ultimately the court held that "[w]hat is of constitutional significance is whether, in the total mix of circumstances, enforcement of Clapper's action would substantially infringe upon the Chesapeake Conference's right to choose its spiritual leaders." *Id.* With this focus in mind, the court

concluded that Clapper's claims could not proceed. *Id.*

Still other cases, though not specifically concerning elementary teachers in religious schools, provide guidance in the analysis of Perich's employment status. Based on the use of the primary duties test to identify ministerial employees, courts have made it clear that "application of the [ministerial exception] depends on the function of the position and not on categorical notions of who is or is not a minister." *Rosati,* 233 F. Supp. 2d at 921.

Nonetheless, this understanding of the rule has generally been used to extend application of the exception to employees who lack official ministerial titles or ordination, not to support holdings that "ministers" are not ministerial employees. *See, e.g., Rayburn,* 899 F.2d at 1168-69. The Seventh Circuit, however, recognized in dicta a possible need for the latter use of the rule where a church uses the title as mere subterfuge; in those cases, the designation will not provide protection from employment discrimination laws. See *Tomic v. Catholic Diocese of Peoria,* 412 F.3d 1036, 1039 (7th Cir. 2006) ("[I]f to avoid having to pay minimum wage to its janitor a church designated all its employees 'ministers,' the court would treat the designation as a subterfuge.").

Finally, the defense asserted by Hosanna-Tabor was analyzed in dicta in another Seventh Circuit case. Although *Schleicher v. Salvation Army* involved ordained ministers alleging violations of the Fair Labor Standards Act ("FLSA"), the court resorted to a hypothetical retaliation claim to explain why it could not apply the FLSA to the ministers:

> If they charged retaliation, and the Salvation Army replied that they had been fired because their filing a suit seeking to enforce wage and overtime claims was inconsistent with their religious obligations as ministers and was thus an independent and adequate ground for firing them, the court would have to explore the doctrines of the Salvation Army that define the role of its ministers. Blocking such inquiries–such entanglements of the secular courts in religious affairs–is one of the grounds on which the ministers exception was devised as a rule of interpretation of employment laws that do not make explicit reference to religious organizations.

518 F.3d 472, 474 (7th Cir. 2008). By asserting that Perich's threats to pursue legal action were inconsistent with the Lutheran Church-Missouri Synod's belief that Christians should not sue Christians in secular courts, Hosanna-Tabor brought the *Schleicher* hypothetical to life.

B. Perich's Employment Status

Considering the circumstances of Perich's employment in light of the foregoing case law, she must be considered a ministerial employee. Factually, Perich's employment situation most closely resembles that of the commissioned minister in *Clapper* and, unlike *DeMarco*, the validity of Hosanna-Tabor's reason for terminating Perich cannot be disposed of by mere factual inquiry. To the contrary and as Schleicher warned, analysis of Hosanna-Tabor's particular defense requires some exploration of religious doctrine in violation of the First Amendment. *See Rayburn*, 772 F.2d at 1169 ("To subject church employment decisions of the

nature we consider today to Title VII scrutiny would also give rise to 'excessive government entanglement' with religious institutions prohibited by the establishment clause of the First Amendment."). Furthermore, there is no indication that Hosanna-Tabor uses the title "commissioned minister" as subterfuge to avoid employment litigation. Hosanna-Tabor does not give the title to just any teacher and the fact that teachers at Hosanna-Tabor need not be Lutheran, even when it comes to teaching religion, does not strip the commissioned minister title of meaning. That Hosanna-Tabor distinguishes between "lay" and "called" teachers by awarding the commissioned minister title suggests that the school values the latter employees as ministerial even if some courts would not.

On the whole, the commissioned minister certificate in this case represents a give-and-take relationship overseen by the Lutheran Church-Missouri Synod. In exchange for completing additional classes in Lutheran theology and obtaining the approval of a voting congregation, teachers are awarded the various employment benefits of being "called." Included in these benefits is an employment relationship that appears to be governed by the same rules as the church applies to its ordained ministers. (*See* Def.'s Mot., Ex. C (quoting Hosanna-Tabor's Constitution and By-Laws as applicable to "Pastors" and "duly Called Professional Ministers").) A called teacher is also listed in a directory of qualified teachers put forth by the Lutheran Church-Missouri Synod to assist schools in need. Furthermore, the Lutheran Church-Missouri Synod publishes an annual roster of commissioned ministers that includes called

teachers. Put simply, this is not a case where the defendant seeks to prove ministerial status after the fact merely to avoid liability. Hosanna-Tabor treated Perich like a minister and held her out to the world as such long before this litigation began.

The separation of church and state in the United States has made federal courts inept when it comes to religious issues;[6] the inquiry into the value of an employee in furthering a religious institution's sectarian mission is no different.[7] The lack of clarity in federal court cases regarding elementary school teachers should not hinder churches from valuing teachers as important spiritual leaders and deciding who will fill those positions as ministerial employees, subject, of course, to inappropriate uses of the title "minister" as subterfuge. For these reasons, it seems prudent in this case to trust Hosanna-Tabor's characterization of its own employee in the months and years preceding the events that led to litigation. Because Hosanna-Tabor considered Perich a "commissioned minister" and the facts surrounding Perich's employment in a religious school with a sectarian mission support this characterization, the Court concludes that Perich was a ministerial employee. If, on these circumstances, the Court were to conclude otherwise, it would risk "infring[ing] upon [Hosanna-Tabor's] right to choose its spiritual leaders." *Clapper*, 1998 WL 904528 at *7.

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[6] *Rweyemamu v. Cote*, 520 F.3d 198, 204-05 (2d Cir. 2008) (explaining the history of the ministerial exception); Rayburn, 772 F.2d at 1167-68.

[7] Note, *supra*, at 1787 ("[C]ourts face difficulty in distinguishing religious from nonreligious activities.").

Because Perich was a ministerial employee of Hosanna-Tabor, this Court can inquire no further into her claims of retaliation. Under the circumstances, "the free exercise clause of the First Amendment protects the act of a decision rather than a motivation behind it. In these sensitive areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content." *Rayburn*, 772 F.2d at 1169. Because no further analysis may be made, the remainder of the issues raised by the parties in their respective briefs for summary judgment are moot.

Accordingly,

IT IS ORDERED that Defendant's motions for summary judgment are **GRANTED.** A judgment consistent with this opinion will issue.

s/PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Copies to:
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James E. Roach, Esq.
Deano C. Ware, Esq.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,
Plaintiff,

v.

HOSANNA-TABOR EVANGELICAL LUTHERAN
CHURCH AND SCHOOL,
Defendant,

and

CHERYL PERICH,
Plaintiff/Intervenor,

v.

HOSANNA-TABOR EVANGELICAL LUTHERAN
CHURCH AND SCHOOL,
Defendant.

Case No. 07-14124
Honorable Patrick J. Duggan

OPINION AND ORDER

At a session of said Court, held in the U.S. District Courthouse, Eastern District of Michigan, on December 3, 2008.

PRESENT:
THE HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

On September 28, 2007, Plaintiff Equal Employment Opportunity Commission ("EEOC") filed this lawsuit against Defendant Hosanna-Tabor Evangelical Lutheran Church and School ("Hosanna-Tabor") alleging a retaliation claim in violation of the Americans with Disabilities Act ("ADA"). The suit arises from Hosanna-Tabor's termination of Cheryl Perich ("Perich") from a teaching position on April 11, 2005. On April 10, 2008, the Court granted Perich's motion to intervene as a plaintiff. Perich asserted a claim of retaliation under the ADA and Michigan's Persons with Disabilities Civil Rights Act ("PDCRA").

In July 2008, each of the parties submitted motions for summary judgment. The motions were fully briefed and this Court held a motion hearing on September 25, 2008. On October 23, 2008, the Court issued an Opinion and Order ("Opinion") granting Hosanna-Tabor's motions for summary judgment and dismissed the EEOC's and Perich's complaints. Presently before the Court is Perich's Amended Motion for Reconsideration and Hosanna-Tabor's Motion for Attorney Fees, Litigation Expenses and Costs. Each motion will be addressed in turn.

I. Perich's Motion for Reconsideration

Eastern District of Michigan Local Rule 7.1(g)(3) provides that a motion for reconsideration should be granted only if the movant demonstrates that the court and the parties have been misled by a palpable defect and that a different disposition of the case must result from correction of that defect. "A palpable defect is one which is obvious, clear, unmistakable, manifest, or plain." *Fleck v. Titan Tire Corp.*, 177 F. Supp. 2d 605, 624 (E.D. Mich. 2001). Furthermore, "the court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court, either expressly or by reasonable implication." E.D. Mich. LR 7.1(g)(3).

In support of her motion for reconsideration, Perich alleges that the Court made two factual mistakes and misapplied the relevant law. In the October 23, 2008, Opinion, the Court concluded that Perich was a ministerial employee of Hosanna-Tabor and, as such, that the Court lacked jurisdiction over the case pursuant to the ministerial exception. Perich asserts that, in arriving at this conclusion, the Court relied on evidence not in the record regarding Hosanna-Tabor's mission and whether Perich was paid with tithes from members of Hosanna-Tabor's church congregation. Furthermore, Perich argues that the Court misapplied, or completely disregarded, the primary duties test that determines whether employees who are not "ministers" are nonetheless "ministerial."

A. Alleged Factual Errors

Perich's motion mischaracterizes and exaggerates the facts that the Court "relied upon" in its

determination that Perich was a ministerial employee. Perich complains that the Court inappropriately accepted statements on Hosanna-Tabor's "purported website" as a statement of the school's mission and then used those statements to "underpin" its conclusion that Perich was a ministerial employee. Perich misunderstands the Court's reference to the statements on the website. Although the Court quoted language from the website in its statement of facts, the language was never identified as Hosanna-Tabor's "mission"[1] and was presented merely to highlight the existence of a factual dispute between the parties. In fact, the website language—which suggests that Hosanna-Tabor is primarily dedicated to sectarian activities—was sandwiched between Perich's contrasting experience and perception regarding the day-to-day operation of the school.[2]

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[1] Although defense counsel referred to the quoted language in his brief as Hosanna-Tabor's mission statement, (Hosanna-Tabor's Mot. for Summ. J. at 12), the Court was skeptical that the language on the website represented the school's official "mission statement."

See http://www.hosannatabor.org/school.htm. For this reason, the Court intentionally refrained from identifying anything on the website as a "mission statement."

[2] The Opinion reads:

> In all, however, activities devoted to religion consumed only about forty-five minutes of the seven-hour school day.
>
> Nonetheless, Hosanna-Tabor's website indicates that it provides a "Christ-centered education" that helps parents by "reinforcing biblical principals [sic] and standards." Hosanna-Tabor also characterizes its staff members as "fine Christian role models who integrate their faith into all subjects." Perich notes, however, that secular school

That the Court ultimately granted Hosanna-Tabor's motion for summary judgment does not mean that the Court accepted the statements on the website as accurate and true. Indeed, the Court assumed for purposes of the motion that Perich's description of her daily activities was accurate. And while the Court did refer to Hosanna-Tabor's "secterian mission" in rendering its decision, Perich mistakenly assumes that this was a reference to the website. In fact, the Court discerned that Hosanna-Tabor has a secterian mission based on the school's undisputed status as a religious institution. *See Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225-26 (6th Cir. 2007) ("[A] religiously affiliated entity is considered a 'religious institution' for purposes of the ministerial exception whenever that entity's mission is marked by clear or obvious religious characteristics." (internal quotation omitted)). Perich has failed in the present motion to establish that the Court's assumption that a religious institution has a secterian mission amounts to palpable error.

Perich also takes issue with the Court's reference to defense counsel's argument that Hosanna-Tabor paid Perich with money received from its tithing church members. At the September 25, 2008, motion hearing, defense counsel assured the Court that such evidence was contained in the record. The Court, however, could find no such evidence and included a

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subjects were taught with textbooks commonly used in public education and that she can only recall twice in her career when she introduced the topic of religion during otherwise secular discussion.

(Opinion at 4.)

statement to that effect in the Opinion to ensure that all parties were aware that the argument had gone unsupported. Removing the footnote in the Opinion that deals with this issue would not change the outcome of the case. Therefore, Perich is not entitled to relief on this ground.

B. The Primary Duties Test

In the second portion of her motion for reconsideration, Perich attempts to relitigate her interpretation of the primary duties test. Although Perich argues that the Court's Opinion disregarded the primary duties test adopted by the Sixth Circuit in *Hollins v. Methodist Healthcare, Inc.*, the Opinion expressly rejected defense counsel's argument that the primary duties test is irrelevant to this case. (Opinion at 11 n.2.) Perich's real disagreement with the Opinion is that it did not adopt the method she advocated for determining primary duties—adding up minutes an employee spends on secular activities and comparing that to the number of minutes spent on religious activities. Rather, the Court adopted a broader view of the primary duties test that considered the entire employment relationship, not just a time-log. Perich's arguments in her motion for reconsideration are merely a continuation of the arguments she made prior to the Opinion and are therefore insufficient to warrant relief on the present motion.[3]

In sum, Perich has failed to identify a palpable

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[3] Perich's motion also states that the Court "misread" *Clapper v. Chesapeake Conference of Seventh-Day Adventitsts*, No. 97-2648, 166 F.3d 1208 (table), 1998 WL 904528 (4th Cir. Dec. 29, 1998). The Court has reviewed Clapper and disagrees.

defect that affected the disposition of this case. Therefore, Perich's motion for reconsideration must be denied.

II. Hosanna-Tabor's Motion for Attorney Fees, Litigation Expenses, and Costs

Also before the Court is Hosanna-Tabor's motion for attorney fees, litigation expenses, and costs based on 42 U.S.C. § 12205. That section of the ADA provides, "the court . . . in its discretion, may allow the prevailing party . . . a reasonable attorney's fee, including litigation expenses, and costs." In exercising its discretion, however, the Court must consider the Supreme Court's holding that an award of attorney's fees to a prevailing defendant is only appropriate "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg v. EEOC*, 434 U.S. 412, 421, 98 S.Ct. 694, 700 (1978).[4]

As noted in the Court's Opinion, this case presented an issue about which other courts have divided and the Sixth Circuit has yet to address. (Opinion at 12.) Although Hosanna-Tabor prevailed on its motions for summary judgment, plaintiffs' arguments were not unreasonable, frivolous, or without foundation. Furthermore, the Court did not detect any indication that either of the plaintiffs

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[4] Although Christiansburg considered the language of the attorney's fee provision in Title VII, 42 U.S.C. § 2000e-5(k), the language is almost identical to that found in the ADA. As a result, other courts have extended *Christiansburg's* holding to claims for attorney's fees under the ADA. See *Adkins v. Briggs & Stratton Corp.*, 159 F.3d 306, 307 (7th Cir. 1998).

proceeded in bad faith. Therefore, Defendant is not entitled to attorney's fees.

Accordingly,

IT IS ORDERED that Perich's Amended Motion for Reconsideration is **DENIED**.

IT IS FURTHER ORDERED that Hosanna-Tabor's Motion for Attorney Fees, Litigation Expenses and Costs is **DENIED**.

s/PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Copies to:
Omar Weaver, Esq.
James E. Roach, Esq.
Deano C. Ware, Esq.

APPENDIX D

Nos. 09-1134/1135

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant (09-1134),

CHERYL PERICH,
Intervenor Plaintiff-Appellant (09-1135),

v.

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,
Defendant-Appellee.

FILED
June 24, 2010
LEONARD GREEN, Clerk

ORDER

BEFORE: GUY, CLAY, and WHITE, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX E

The Americans with Disabilities Act, 42 U.S.C. §§ 12111 and 12203, provides in relevant part as follows:

§ 12111. Definitions

As used in this subchapter:

. . .

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

. . .

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include—

(i) the United States, a corporation wholly

owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of Title 26.

. . .

(7) Person, etc.

The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

§ 12203. Prohibition against retaliation and coercion

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

APPENDIX F

The Michigan Persons with Disabilities Civil Rights Act, §§ 37.1201 and 37.1602, provides in relevant part as follows:

§ 37.1201. Definitions

Sec. 201. As used in this article:

. . .

(b) "Employer" means a person who has 1 or more employees or a person who as contractor or subcontractor is furnishing material or performing work for the state or a governmental entity or agency of the state and includes an agent of such a person.

§ 37.1602. Prohibited Practices

Sec. 602. A person or 2 or more persons shall not do the following:

(a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Equal Employment Opportunity Commission,
Plaintiff,
v.
Hosanna-Tabor Evangelical Lutheran
Church and School, Defendant,

and

Cheryl Perich, Plaintiff/Intervenor
v.
Hosanna-Tabor Evangelical Lutheran
Church and School, Defendant.

Case No. 2:07-CV-14124
Hon. Patrick J. Duggan
Mag. Judge Steven D. Pepe

COMPLAINT

Plaintiff/Intervenor Cheryl Perich, by and through her attomeys Vercruysse Murray & Calzone, P.C., submits its following Complaint against defendant Hosanna-Tabor Evangelical Lutheran Church and School.

JURISDICTION

1. The Equal Employment Opportunity Commission ("EEOC") has filed a lawsuit against defendant Hosanna-Tabor Evangelical Lutheran Church and School ("Hosanna-Tabor") asserting

retaliation in violation of the Americans with Disabilities Act of 1990 ("ADA").

2. Pursuant to Section 706(f)(I) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(I), Perich has a right to intervene as a plaintiff in this lawsuit asserting retaliation in violation of the Americans with Disabilities Act of 1990 ("ADA").

3. Accordingly, this Court has jurisdiction over Perich's ADA claim.

4. Pursuant to 28 U.S.C. § 1367, this Court has supplemental jurisdiction over Perich's state law claims.

STATEMENT OF FACTS

5. In 1999, intervenor plaintiff Cheryl Perich began her employment with defendant Hosanna-Tabor as a grade school teacher.

6. In the summer of 2004, Perich became ill and underwent a number of medical tests to determine the cause. The principal, Stacey Hoeft, informed Perich that she should go out on a disability leave, but she would "still have a job with us" when she returns.

7. In or about December, 2004, a neurologist determined that Perich was suffering from narcolepsy, and was able to successfully treat Perich utilizing drugs.

8. In January, 2005, Perich informed Hoeft that she would be able to return work in the last two weeks of February, 2005. Shortly thereafter, Hoeft informed a co-worker that "I'm not a doctor, but as sick as she's [Perich] been I don't think that she'll be back this year and probably not next year."

9. On or about January 30, 2005, a meeting was held between the Board and certain members of the congregation. During that meeting, the Board and the congregation decided to ask Perich to resign if Hosanna-Tabor was willing to partially pay her medical insurance for a limited time.

10. On February 8, 2005, Perich's neurologist released Perich to return to work without restrictions effective February 22, 2005, which is prior to the expiration of Perich's disability leave.

11. On February 10, 2005, Scott Salo, the President of the School Board for Hosanna-Tabor, called Perich to meet with her to discuss her job and her medical insurance. Perich requested a meeting with the Board to plead that she had been released to work and she was able to do so. Salo later informed Perich that the Board would meet with her on February 13, 2005.

12. Perich's meeting with the Board took place as scheduled on February 13, 2005. At the beginning of the meeting, Salo gave Perich a written proposal wherein Perich would resign if the Church paid part of her medical insurance for a limited time. In response, Perich provided the Board with a copy of the return to work signed by her neurologist and informed the Board that she was willing and able to return to her job.

13. The Board, however, chose to reject her doctor's decision that Perich could return to work without restrictions. Board member Kurt Ostrander opined that he "wouldn't drive if I were you, not even if the doctor says you can." Board member Sheila Simpson informed the Board that "I have a

medical background and I know that you have to be without symptoms for at least three months before you can be sure that the medicine is working well enough that you won't have symptoms again. If I were a parent who has a child in this school, I'd want you to be without symptoms for 6 months with no episodes for 6 months or maybe even a year before I'd want my child in your class."

14. Perich responded that the Board's decision to reject her doctor's authorization to return to work would cause a real problem because she was no longer eligible for disability insurance coverage since she could work. The Board's response was that "[a]ll you have to do is call your doctor and tell them that your employer has a rule that you have to be symptom free for three months before you can return to work. He'll take his copy of the return to work slip out of your file and change things in his file to say that you can come back later. I know doctors."

15. The next day, February 14, 2005, Perich spoke with Board member Jim Pranske and told him that she thought it would be against the law to ask her doctor to falsify her return slip. Pranske told Perich that she should ask her doctor, and if he refuses, all she can do is to resign from her employment.

16. On February 22, 2005, Perich went to the school to report to work upon the expiration of her disability leave. Hoeft told Perich to go home, saying "I'm not the only person that doesn't want you here. Parents have told me that they would be uncomfortable with you in the building." That same day, Salo sent Perich a letter directing her not to

return to the school.

17. Later that day, Hoeft called Perich and informed her that she would most likely be fired. Perich responded that she had been talking to an attorney and would assert her legal rights against discrimination even though she had been trying to work out the issue with Hoeft and the Board.

18. On March 19, 2005, Salo sent Perich a letter informing her that they were going to have a vote to terminate her employment. As stated by Salo, "We are also requesting this because we feel that you have damaged, beyond repair, the working relationship you had with the Administration and School Board by threatening to take legal action against Hosanna-Tabor Lutheran Church and School."

19. On or about April 10, 2005, Hosanna-Tabor terminated her employment.

20. On or about May 17, 2005, Perich filed a Charge of Discrimination with the EEOC, alleging that the Hosanna-Tabor terminated her employment because it regarded Perich as being disabled in violation of the American Disabilities Act ("ADA") and in retaliation for threatening legal action against Hosanna-Tabor to oppose its acts against Perich in violation of the ADA.

21. On or about September 28, 2007, the EEOC filed its Complaint against Hosanna- Tabor alleging that it unlawfully retaliated against Perich in violation of Section 503(a) of the ADA, 42 U.S.C. § l2203(a), which is currently pending before the Court.

COUNT I
RETALIATION IN VIOLATION OF THE AMERICANS WITH DISABILITIES ACT

22. Plaintiff incorporates by reference the allegations set forth in paragraphs 1-21 above, as if restated word for word herein.

23. Hosanna-Tabor is an employer that is a covered entity under Section 101(2) of the Americans With Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12111(2).

24. Hosanna-Tabor engaged in unlawful employment practices at its Redford, Michigan facility in violation of Section 503(a) of the ADA, 42 U.S.C. § 12203(a), including but not limited to terminating Perich's employment in retaliation for threatening to file an ADA lawsuit against Hosanna-Tabor and opposing Hosanna-Tabor's unlawful acts.

25. The unlawful employment practices and retaliating against Perich were intentional.

26. The unlawful employment practices and retaliating against Perich were done with malice or with reckless indifference to the federally protected rights of Perich.

COUNT II
RETALIATION IN VIOLATION [sic] MICHIGAN'S PERSONS WITH DISABILITIES CIVIL RIGHTS ACT

27. Plaintiff incorporates by reference the allegations set forth in paragraphs 1-26 above, as if restated word for word herein.

28. Hosanna-Tabor is an "employer" as defined

under Michigan's Persons With Disabilities Civil Rights Act ("PDCRA"), M.C.L. § 37.1201(b).

29. Pursuant to the PDCRA, an employer is prohibited from retaliating or discriminating against a person because the person has opposed a violation of this Act. MCL §37.1602(a).

30. Hosanna-Tabor terminated Perich's employment by retaliating against her for opposing Hosanna-Tabor's violations of the PDCRA.

RELIEF

Wherefore, Cheryl Perich asks the Court to enter judgment against Hosanna- Tabor for its unlawful acts, including but not limited to the following request for relief:

A. Grant a permanent injunction enjoining its defendant, its officers, successors, assigns, and all persons in active concert or participation with it from engaging in retaliation and any other employment practice which discriminates on the basis of a disability.

B. Order defendant to institute and carry out policies, practices, and programs which provide equal employment opportunities for qualified individuals with disabilities, and which eradicate the effects of its past and present unlawful employment practices.

C. Award Perich the amount of her losses, including but not limited to her lost earnings and benefits and to reinstate Perich to the position from which she was terminated with pay and benefits equal to that which she would have attained had she not been terminated or providing Perich with

appropriate front pay in lieu of reinstatement.

D. Award Perich whole by providing compensation for past and future pecuniary losses resulting from the unlawful employment practices as set forth above.

E. Award Perich whole by providing compensation for past and future non-pecuniary losses resulting from the unlawful employment practices as set forth above, including but not limited to mental and emotional distress.

F. Award Perich punitive damages for defendant's malicious and reckless conduct. G. Grant such other further and/or other relief that is just under the circumstances.

I. Award Perich her attorney fees incurred in brining this action against defendant.

Respectfully submitted,
VERCRUYSSE MURRAY & CALZONE, P.C.

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Dated: March 11, 2008

APPENDIX H

HANDBOOK
OF
THE LUTHERAN CHURCH
MISSOURI SYNOD
2004 EDITION

[available online at
http://www.lcms.org/graphics/assets/
media/LCMS/2004Handbook.pdf]

2004
Constitution, Bylaws, and Articles of Incorporation
as amended by the 2004 national convention
10–15 July 2004

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1333 S. Kirkwood Road, St. Louis, MO 63122
Telephone: (314) 965-9000

1.10 Dispute Resolution of the Synod

Preamble

1.10.1 When disputes, disagreements, or offenses arise among members of the body of Christ, it is a matter of grave concern for the whole church. Conflicts that occur in the body should be resolved promptly (Matt. 5:23-24; Eph. 4:26-27). Parties are urged by the mercies of God to proceed with one another with "the same attitude that was in Christ Jesus" (Phil. 2:5). In so doing, individuals, congregations, and various agencies within the Synod are urged to reject a "win- lose" attitude that typifies secular conflict. For the sake of the Gospel, the church should spare no resource in providing assistance.

1.10.1.1 The Holy Scriptures (1 Cor. 6:1-7) urge Christians to settle their differences by laying them before the "members of the brotherhood." Therefore, the Synod, in the spirit of 1 Corinthians 6, calls upon all parties to a disagreement, accusation, controversy, or disciplinary action to rely exclusively and fully on the Synod's system of reconciliation and conflict resolution. The use of the Synod's conflict resolution procedures shall be the exclusive and final remedy for those who are in dispute. Fitness for ministry and other theological matters must be determined within the church. Parties are urged, in matters of a doctrinal nature, to follow the procedures as outlined in Bylaw section 1.8.

1.10.1.2 The words of Jesus in Matthew 18:15-20 provide the basis for church discipline for the local congregation. The same passage also grants Christ's guidance to all Christians in seeking to settle other disputes, many of which fall outside the purview of church discipline involving the congregation. In either case, the steps of Matthew 18 should be applied lovingly in both formal and informal settings. The parties and others attempting to effect resolution of a dispute must always remain mindful that the church has been given the "ministry of reconciliation" (2 Cor. 5:18). Hence, conflict resolution in the church is to lead to reconciliation, restoring the erring member in a spirit of gentleness (Gal. 6:1). Its aim is to avoid the adversarial system practiced in society.

1.10.1.3 The heart and center of all Christian conflict resolution is the justification of the sinner through grace in Christ Jesus. Biblical reconciliation of persons in conflict begins with God's truth that we are all sinners who have been reconciled to God through the death and resurrection of Christ Jesus. Christ's "ministry of reconciliation" is one of the church's foremost priorities.

1.10.1.4 Christian conflict resolution seeks to resolve disputed issues in a manner pleasing to God. Those in conflict are urged to proceed prayerfully in good faith and trust. Disputes are more likely to be resolved harmoniously if those involved in the conflict recognize one another as redeemed children of God.

1.10.1.5 Christians involved in conflict must always stand ready to ask for or extend forgiveness in accordance with Scripture. As the church endeavors to help bring about peace, truth, justice, and reconciliation, it always seeks to do so with a proper distinction between Law and Gospel, that is, in the context of God's judgment and mercy. We are ever to be mindful that it is God who judges the hearts of sinful men and grants His gracious word of forgiveness to us all.

1.10.1.6 When there is repentance and reconciliation, the body of Christ rejoices in its oneness with Christ and with one another.

Purpose

1.10.2 This procedure is established to resolve, in a God-pleasing manner, disputes that involve as parties, (1) members of the Synod, (2) the Synod itself, (3) a district or an organization owned and controlled by the Synod, (4) persons involved in excommunication, or (5) lay members of congregations of the Synod holding positions with the Synod itself or with districts or other organizations owned and controlled by the Synod. It shall be the exclusive remedy to resolve such disputes that involve theological, doctrinal, or ecclesiastical issues except those covered under Bylaw sections 2.14-2.17 and except as provided in Bylaw 1.10.3. It is applicable whether the dispute involves only a difference of opinion without personal animosity or is one that involves ill will and sin that requires repentance and forgiveness. No person or

agency to whom or to which the provisions of this dispute resolution process are applicable because such person or agency is a member of the Synod may render these provisions inapplicable by terminating that membership.

Exceptions

1.10.3 This chapter provides evangelical procedures to remedy disputes only and does not set forth procedures for expulsion from membership (Constitution, Art. XIII and Bylaw sections 2.14–2.17) nor does it set forth procedures for board of regents' supervision of faculty and administration as specified in Bylaws 3.8.2.7.5–3.8.2.7.9 and 3.8.3.8.5–3.8.3.8.9. While Christians are encouraged to seek to resolve all their disputes without resorting to secular courts, this chapter does not provide an exclusive remedy for the following matters, unless such matters involve theological, doctrinal, or ecclesiastical issues, including those arising under the divine call of a member of the Synod:

(a) Disputes concerning property rights (e.g., real estate agreements, mortgages, fraud, or embezzlement); and

(b) Disputes arising under contractual arrangements of all kinds (e.g., contracts for goods, services, or employment benefits).

Definition of Terms as Used in This Bylaw Section 1.10

1.10.4 In order to communicate effectively and avoid misunderstanding, it is critical that terms be carefully defined:

(a) Administrator: The secretary of a district or of the Synod or an appointee (Bylaw 1.10.6) who manages the dispute resolution process but who does not take leadership, declare judgments, advise, or become involved in the matter in dispute.

(b) Appeal Panel: Three district presidents selected according to these bylaws to determine whether the decision of a Dispute Resolution Panel should be reconsidered or reviewed.

(c) Blind draw: Selection of names according to the procedures set forth in the Standard Operating Procedures Manual.

(d) Complainant: A party and/or parties to a dispute who initiate an action to settle a conflict under the provisions of the Synod's dispute resolution process.

(e) Dispute Resolution Panel: Three persons who are reconcilers selected according to these bylaws and one person who is a nonvoting hearing facilitator selected according to these bylaws, who shall hear matters in dispute between parties and assist in reconciliation or provide for a resolution of the dispute by rendering a final decision.

(f) Face-to-face: A meeting face-to-face, in person, between the parties in dispute following the guidelines of Matthew 18:15. E-mail, regular mail, fax, or telephone call (or any combination thereof) does not satisfy this requirement. (Note: Failure to conduct a face-to-face meeting within 30 days or within such

extension as may be established by the involved ecclesiastical supervisors shall result in dismissal if the fault lies with the accuser or movement to the next stage if the fault lies with the accused.)

(g) Formal: Efforts to resolve the dispute toward reconciliation beginning with the formal reconciliation meeting.

(h) Hearing facilitator: One selected according to these Bylaws and trained to serve as a facilitator for hearings before panels.

(i) Informal: All efforts toward reconciliation prior to the formal reconciliation meeting.

(j) Party and/or parties to a dispute or the matter (Party to the matter in dispute): A "party and/or parties to a dispute" is either a complainant or a respondent. A reconciler, panel member, hearing facilitator or ecclesiastical supervisor is not a "party and/or parties to a dispute."

(k) Persons involved: "Persons involved" includes the complainant, the respondent, the administrator of the process, the ecclesiastical supervisor, a reconciler, panel members, the hearing facilitator, a witness, an advisor, or any others involved in the dispute resolution process.

(l) Reconciler: As used in this chapter, a member of The Lutheran Church—Missouri Synod or of an LCMS congregation who is appointed to be available to assist parties to a dispute with a view toward reconciling them or enabling them to adjust or settle their dispute

and who has completed the Synod's training program. A reconciler does not judge or take sides but rather, with the help of God, assists both parties to find their own resolution to the dispute.

(m) Reply of Respondent: A written response issued by a party to a dispute containing factual assertions that answer a complainant's statement of the matter in dispute.

(n) Respondent: One who is named party to a dispute brought by a complainant.

(o) Review Panel: Three reconcilers selected according to these Bylaws and one person who is a nonvoting hearing facilitator selected according to these Bylaws who shall give a final hearing when the determination of the Appeal Panel is that a decision of the Dispute Resolution Panel should be reconsidered or reviewed.

(p) Statement of the Matter in Dispute: A written concise statement containing factual assertions involving contended or conflicted issues between one or more parties. The statement may also contain a request for the type of relief to be granted.

(q) Witness: A person called to give testimony regarding facts to a dispute before a Dispute Resolution Panel. A reconciler appointed to assist parties in dispute resolution or a person called upon by a reconciler at the formal reconciliation meeting shall not testify as a witness before a Dispute

Resolution Panel in the same dispute.

Informal Efforts toward Reconciliation; Consultation

1.10.5 Before any matter is submitted to the formal reconciliation process,the parties involved in a dispute must meet together, face-to-face, in a good-faith attempt to settle their dispute according to the scriptural mandate of Matthew 18:15 and may involve the informal use of a reconciler. And further, before any matter is submitted to the formal reconciliation process, the complainant must meet and consult with his or her ecclesiastical supervisor to seek advice and also so that it can be determined whether this is the appropriate bylaw procedure (Bylaw section 1.10) or whether the matter falls under Bylaw sections 1.8, 2.14, 2.15, 2.16, 2.17, or Bylaws 3.8.2.7.9 and 3.8.3.8.9. In regard to this consultation:

(a) The district president shall inform the district president of the respondent that a consultation is underway. He may also seek advice from the vice-presidents of his own district or from the district president of the respondent. The district president may also ask for an opinion of the Commission on Constitutional Matters (CCM) and/or the Commission on Theology and Church Relations (CTCR). The district president must follow any opinion received from either the CCM or the CTCR, which shall be rendered

within 30 days or such additional time as the district president may allow.

(b) The district president shall require the complainant to follow the correct bylaw provision under the circumstance, if any, and shall provide evangelical supervision, counsel, and care to the party or parties.

(c) If Bylaw section 1.10 applies, the district president shall require the complainant to carry out the mandate of Matthew 18:15 face-to- face with the respondent if the complainant has not already done so as set forth above. The reputation of all parties is to be protected as commanded in the Eighth Commandment. The goal throughout is always one of reconciliation, of repentance and forgiveness, even if the following proceedings are carried out.

Formal Efforts toward Reconciliation

1.10.6 If either party is of the opinion that informal reconciliation efforts have failed, such party, in consultation with his or her ecclesiastical supervisor, shall submit a request to the administrator of the dispute resolution process, the secretary of the Synod or district, or an appointee, as appropriate, that a reconciler be appointed to assist in seeking reconciliation. Such request shall be accompanied by

(a) a written statement of the matter in dispute; and

(b) a written statement setting forth, in detail, the informal efforts that have been made to achieve reconciliation.

If the secretary of the Synod or district is a party to the matter in dispute, has a conflict of interest, or serves as a witness, then the President of the Synod or the district president, as appropriate, shall appoint an administrator of the process in the matter.

1.10.6.1 The administrator shall promptly select the reconciler in the manner hereinafter set forth and then notify the parties to the dispute as to the name and address of the reconciler. He or she shall also forward to the chosen reconciler and the respondent the statement of the matter in dispute and the written statement of the informal reconciliation efforts.

1.10.6.2 If the reconciler determines that informal reconciliation efforts have been inadequate, the reconciler shall direct the parties to engage in further informal reconciliation efforts. Such additional time shall not exceed 60 days.

1.10.6.3 If informal reconciliation efforts do not resolve the matter, the reconciler shall direct the respondent to submit to the reconciler and the complainant a written reply responding to the statement of the matter in dispute. The reconciler shall simultaneously arrange a formal reconciliation meeting with the parties to the dispute. Such meeting shall be scheduled by the reconciler at the earliest reasonable date possible, at a location which will minimize travel for the parties to the dispute.

1.10.6.4 At the formal reconciliation meeting, the reconciler shall listen to the facts as presented

by the parties to the dispute and seek to reconcile their differences on the basis of Christian love and forgiveness. With the approval of the reconciler, each party may, in the manner described in Matthew 18:16, bring one or two persons to the meeting "so that every matter may be established by their testimony." Such meeting shall not be open to the public, nor shall any formal record be made thereof. The reconciler may draw upon persons and resources that the reconciler deems necessary to assist in the reconciliation process.

1.10.6.5 Upon conclusion of the formal reconciliation meeting or meetings, the reconciler shall prepare a written report which contains the actions of the reconciler, the issues that were resolved, the issues that remain unresolved, and whether reconciliation was achieved. Attached to the report shall be

(a) the statement of the complainant as to informal reconciliation efforts;

(b) the statement of the matter in dispute; and

(c) any reply by the respondent.

No information shared in confidence shall be included in the report. The report and the attachments shall be forwarded to the parties to the dispute and the secretary of the Synod or district as appropriate.

Procedure of a Dispute Resolution Panel

1.10.7 If the parties with the assistance of the reconciler have been unable to achieve

reconciliation, the complainant shall notify the Secretary of the Synod within 30 days after receiving the report from the reconciler if the matter is to be presented to a Dispute Resolution Panel.

1.10.7.1 If the complainant requests the formation of a Dispute Resolution Panel, the Secretary of the Synod, or his representative, shall, within 21 days, select such a panel in the prescribed manner and then forward to each panel member a copy of the report of the reconciler with its attachments.

1.10.7.2 Each Dispute Resolution Panel shall have a nonvoting hearing facilitator who will serve as chairman of the panel. Within 30 days after the appointment of the panel, the hearing facilitator shall confer with the parties and the Dispute Resolution Panel for the purpose of choosing a location and a date for the formal hearing of the matter.

1.10.7.3 The formal hearing before the Dispute Resolution Panel, conducted by a hearing facilitator, shall take place within 60 days after the date of final selection of the hearing facilitator, unless there is unanimous consent by the panel members for a short delay beyond such 60 days for reasons the panel deems appropriate.

1.10.7.4 The following rules for the Dispute Resolution Panel shall apply:

(a) The hearing shall be private, attended only by the parties and one adviser of each party's choice, should any party desire one. This

adviser shall not address the panel or participate in the discussion at the hearing. Witnesses who can substantiate the facts relevant to the matter in dispute may be called before and address the panel. The administrator of the process shall not attend the hearing or serve as a witness. The panel shall establish the procedure to be followed in the hearing and the relevancy of evidence so that each party shall be given an opportunity fully to present its respective position. In performing its duty, the panel shall continue efforts to reconcile the parties on the basis of Christian love and forgiveness.

(b) Within 60 days after the final hearing, the panel shall issue a written decision that shall state the facts determined by the panel and the reasons for its decision.

(c) The panel shall forward a copy of its decision to

(1) each party to the matter in dispute;

(2) the Secretary of the Synod;

(3) the President of the Synod; and

(4) the president of the respective district.

(d) Subject to request for review or appeal (contemplated or pending), the final decision of a Dispute Resolution Panel shall

(1) be binding upon the parties to that dispute;

(2) have no precedential value;

(3) be carried out by the appropriate

person, group, or member of the Synod; and

(4)be publicized as deemed appropriate under the circumstances by the district president or the President of the Synod.

Reconsideration of a Dispute Resolution Panel Decision

1.10.8 Within 30 days after receiving the decision of the Dispute Resolution Panel, any party to the dispute or the President of the Synod, if a question of doctrine or practice is involved (Constitution, Art. XI B 1-3), may appeal the decision. The President may also request that an opinion of the Commission on Constitutional Matters or the Commission on Theology and Church Relations be obtained.

1.10.8.1 Such appeal shall be mailed to the Secretary of the Synod, each member of the Dispute Resolution Panel, and the other parties to the dispute and shall be accompanied by a written memorandum stating the basis of the request.

1.10.8.2 Within 30 days after receipt, an Appeal Panel shall be selected in the prescribed manner, and the Secretary of the Synod shall send the appeal to each panel member.

1.10.8.3 Within 30 days after its formation, the Appeal Panel shall issue its written decision in response to the request for reconsideration.

1.10.8.4 If an appeal is granted, the Secretary of the Synod, or his representative, shall, within 21 days, select a Review Panel in the prescribed

manner. The Review Panel shall generally decide the issue on the record without further formal hearing but may follow the procedure used by a Dispute Resolution Panel if deemed necessary.

1.10.8.5 The final decision of the Review Panel shall

(a) be binding upon the parties to that dispute and not be subject to further appeal;

(b) have no precedential value;

(c) be carried out by the appropriate person, group, or member of the Synod; and

(d) be publicized as deemed appropriate under the circumstances by the district president or the President of the Synod.

Congregation's Right of Self-Government

1.10.9 The congregation's right of self-government shall be recognized. However, when a decision of a congregation is at issue, a Dispute Resolution Panel may review the decision of the congregation according to the Holy Scriptures and shall either uphold the action of the congregation or advise the congregation to review and revise its decision. If the congregation does not revise its decision, the other congregations of the Synod shall not be required to respect this decision, and the district involved shall take action with respect to the congregation as it may deem appropriate.

District Reconcilers

1.10.10 **Within three months after conventions of the Synod, each district board of directors shall appoint a district roster of four reconcilers, no more than two of whom shall be pastors, from a list supplied by the circuit counselors of the district.**

1.10.10.1 **The term of service shall be six years, renewable without limit. They shall be people "of good reputation, full of the Holy Spirit and wisdom" (Acts 6:3). Vacancies for an unexpired term shall be filled in the same manner by the district board of directors within 30 days following their occurrence. The district board of directors may add to the district roster of reconcilers a reconciler who moves into the district from the district where appointed.**

1.10.10.2 **One of the four shall be chosen by blind draw according to the procedures set forth in the Standard Operating Procedures Manual (hereafter referred to as the SOPM) by the secretary of the district to serve as reconciler in the following situations arising in the district:**

(a) Procedural questions involved in excommunication cases;

(b) Cases in which a member of the Synod shall have been removed from the position that such member holds in a congregation that is a member of the Synod;

(c) Cases in which a person, whether or not a member of the Synod, is removed from the position which the person holds in the district;

and

(d) Cases involving differences between congregations within the same district or between a congregation and its district.

1.10.10.3 The members of the district roster of reconcilers of all the districts shall comprise the Synod's roster of reconcilers. One member of the Synod's roster of reconcilers shall be chosen by blind draw according to the SOPM by the Secretary of the Synod in all disputes except those

(a) enumerated in Bylaw 1.10.10.2; or

(b) cases under Article XIII of the Constitution, which shall follow the procedure for terminating membership set forth in Bylaw sections 2. 14-2. 17.

Special Considerations for Reconcilers

1.10.11 Limitations on holding multiple offices do not apply to reconcilers.

1.10.11.1 If a reconciler moves from the district where appointed, such reconciler shall remain as a member of the Synod's roster of reconcilers until the term of service of the reconciler expires.

1.10.11.2 If all of the district reconcilers are unavailable for a particular matter, the secretary of the district shall request that a reconciler from another district be chosen in the prescribed manner by the secretary of the other district.

Hearing Facilitators

1.10.12 After the training of the reconcilers and in consultation with the appropriate district presidents, the Secretary of the Synod shall identify 25 of the reconcilers who exhibit skills in the proper conduct of a fair and impartial hearing to comprise the Synod's roster of hearing facilitators, who shall be trained for such purpose.

(a) The term of service shall be six years, renewable without limit.

(b) Any vacancies for an unexpired term shall be filled in the same manner as described above as needed and as requested by the Secretary of the Synod.

1.10.12.1 Limitations on holding multiple offices do not apply to hearing facilitators.

1.10.12.2 If a hearing facilitator moves from the district where nominated, such hearing facilitator, if on the roster of hearing facilitators, shall remain as a member of the Synod's roster of hearing facilitators until the term of service of the hearing facilitator expires.

1.10.12.3 A hearing facilitator shall not serve as a reconciler or as a voting member of a panel.

Dispute Resolution Panels

1.10.13 The Synod's roster of reconcilers shall comprise the list from which dispute resolution panel voting members will be selected.

1.10.13.1 Each Dispute Resolution Panel shall consist of three voting members, at least one of whom shall be a pastor and one a layperson.

(a) Nine names shall be selected by a blind draw from the dispute resolution roster.

(b) No member of a panel shall be from the district in which the dispute arose or, if it is a Synod question, from any district in which a party holds membership.

(c) The list shall be mailed simultaneously to each party, who shall be entitled to strike three names and return the list to the Secretary of the Synod within one week.

(d) The Secretary of the Synod shall correct any problem with the panel from the remaining names by blind draw according to the SOPM. In the event that additional names are needed, three names will be selected in the manner set forth above and those names submitted to each party who shall have a right to strike one. In the event that there is more than one remaining, the secretary shall determine the final member by a blind draw according to the SOPM from the remainder.

1.10.13.2 The hearing facilitator shall be selected as follows:

(a) Three names shall be selected by a blind draw according to the SOPM from the hearing facilitator roster.

(b) No hearing facilitator shall be from the district in which the dispute arose or from any district in which a party holds membership.

(c) The list shall be mailed simultaneously to each party, who shall be entitled to strike one name and return the list to the Secretary of the Synod within one week.

(d) The Secretary of the Synod shall correct any problem with the panel from the remaining names by blind draw according to the SOPM. In the event that additional names are needed, three names will be selected in the manner set forth above and those names submitted to each party, who shall have the right to strike one. In the event that there is more than one remaining, the Secretary shall determine the final member by a blind draw according to the SOPM from that remainder.

1.10.13.3 The hearing facilitator shall conduct the hearing, shall serve as chairman of the panel, and may draw upon persons and resources that he deems necessary for conducting a hearing in a fair and equitable manner.

1.10.13.4 The Dispute Resolution Panel shall select its own secretary from its members.

Appeal Panels

1.10.14 The Appeal Panel shall be made up of three district presidents who shall be trained for such service.

(a) One district president shall be selected by the complainant, one selected by the respondent, and the third selected by the two appeal panel members so selected.

(b) If the two appeal panel members cannot agree on a third, the Secretary of the Synod

shall select the third member by blind draw according to the SOPM from the remaining district presidents.

Review Panels

1.10.15 Review Panel members shall be selected from the Synod's roster of reconcilers.

1.10.15.1 Each Review Panel shall consist of three voting members, at least one of whom shall be a pastor, and at least one layperson.

(a) Nine names shall be selected by a blind draw according to the SOPM from the roster of reconcilers of the Synod.

(b) No member shall be from the district in which the dispute arose, or, if it is a Synod question, from any district in which a party holds membership.

(c) The list shall be mailed simultaneously to each party, who shall be entitled to strike three names and return the list to the Secretary of the Synod within one week.

(d) The Secretary of the Synod shall correct any problem with the panel from the remaining names by blind draw according to the SOPM. In the event that additional names are needed, three names will be selected in the manner set forth above and those names submitted to each party who shall have the right to strike one. In the event that there is more than one remaining, the Secretary shall determine the final member by a blind draw according to the SOPM from that remainder.

1.10.15.2 The hearing facilitator shall be selected as follows:

(a) Three names shall be selected by a blind draw according to the SOPM from the hearing facilitator roster.

(b) No hearing facilitator shall be from the district in which the dispute arose or from any district in which a party holds membership.

(c) The list shall be mailed simultaneously to each party, who shall be entitled to strike one name and return the list to the Secretary of the Synod within one week.

(d) The Secretary of the Synod shall correct any problem with the panel from the remaining names by blind draw according to the SOPM. In the event additional names are needed, three names will be selected in the manner set forth above and those names submitted to each party, who shall have the right to strike one. In the event that there is more than one remaining, the secretary shall determine the final member by a blind draw according to the SOPM from that remainder.

1.10.15.3 The hearing facilitator shall conduct the hearing, shall serve as chairman of the panel, and may draw upon persons and resources that he deems necessary for conducting a hearing in a fair and equitable manner.

1.10.15.4 The Review Panel shall select its own secretary from its members.

Disqualification

1.10.16 The standard for disqualification of a reconciler or panel member or hearing facilitator shall be actual partiality or the appearance thereof.

1.10.16.1 Any party and/or parties to a dispute shall have the right to request disqualification of a reconciler, panel member, or hearing facilitator. If that individual does not agree to the disqualification, the decision shall be made by a separate three-member panel of reconcilers drawn for that purpose according to the SOPM.

1.10.16.2 In the event that a reconciler, panel member, or hearing facilitator is disqualified, another individual shall be chosen by blind draw according to the SOPM.

1.10.16.3 An individual who has served as a reconciler in a matter shall not be a member of the Dispute Resolution Panel in the same matter.

Decisions

1.10.17 The Dispute Resolution Panel, Appeal Panel, or Review Panel shall issue a decision based on a majority vote of the panel.

(a) A majority of the panel members shall be involved in all stages of the decision-making process.

(b) The hearing facilitator shall serve as an advisor to the panel on the form but not the substance of the decision.

(c) In the event that a majority decision cannot be reached, a new panel shall be formed immediately in accordance with the Bylaws and the matter reheard.

Rules of Procedure

1.10.18 Reconcilers, Dispute Resolution Panels, Appeal Panels, and Review Panels shall be governed in all their actions by Holy Scripture, the Lutheran Confessions, and the Constitution and Bylaws of the Synod.

1.10.18.1 The following rules of procedure shall be followed:

(a) In the interest of promoting the reconciliation process, any member of the Synod, officer of a congregation, or officer of any organization owned or controlled by the Synod shall, when called upon by a Dispute Resolution Panel, Appeal Panel, or Review Panel to do so, testify or produce records related to the dispute. Each party and/or parties to a dispute shall assume its/their own expenses. The expenses of reconcilers, Dispute Resolution Panels, and Review Panels shall be borne by the Synod, except for those that arise under Bylaw 1.10.10.2, which shall be borne by the district.

(b) No party and/or parties to a dispute nor anyone on the party's behalf shall either directly or indirectly communicate with the reconciler, the hearing facilitator, or any member of the Dispute Resolution Panel, Appeal Panel, or Review Panel without the

full knowledge of the other party to the dispute.

(c) While the matter is still undecided or while an appeal is contemplated or pending, publicity shall not be given to the issues in the matter by any of the persons involved during any part of the procedures outlined in this bylaw. However, at his discretion and as needs dictate in order to "promote and maintain unity of doctrine and practice" (Constitution, Art. XI B 3) and in order to provide counsel, care, and protection to all the members of the Synod (Constitution, Art. III 8, 9), the President of the Synod or the district president in consultation with the President of the Synod, as the case may be, may properly advise or inform the involved congregation(s) and/or the district or the Synod as to the status of the process.

(d) Any party and/or parties may seek, at its/their own personal expense, the assistance of individuals familiar with the issues involved in the dispute. They may actively participate in research and the preparation of necessary documents. At the hearing, however, each party may have an adviser present but must represent itself, with no public participation by the adviser. Any reconciler or hearing facilitator shall not serve as an adviser. If a party and/or parties is a board or commission of the Synod or its districts, it shall be represented by its chairman or designated member.

(e) A Dispute Resolution Panel, Appeal Panel, or Review Panel shall determine the number of witnesses necessary for a full and complete understanding of the facts involved in the dispute. It shall question parties and witnesses directly and shall also permit the parties to do so.

(f) All Dispute Resolution Panel, Appeal Panel, or Review Panel records of disputes in which a final decision has been rendered by the Dispute Resolution Panel, Appeal Panel, or Review Panel shall be placed in the custody of Concordia Historical Institute. All such records shall be sealed and shall be opened only for good cause shown and only after permission has been granted by a Dispute Resolution Panel, selected by blind draw for that purpose.

(g) If any part of the dispute involves a specific question of doctrine or doctrinal application, each party shall have the right to an opinion from the Commission on Theology and Church Relations. If it involves questions of constitution or bylaw interpretation, each party shall have the right to an interpretation from the Commission on Constitutional Matters. The request for an opinion must be made through the Dispute Resolution Panel or Review Panel, which shall determine the wording of the question(s). The request for an opinion must be made within four weeks of the final formation of the Dispute Resolution Panel or Review Panel. If a party does not request such an opinion within the designated

time, such a request may still be made to the Dispute Resolution Panel or Review Panel that shall, at its discretion, determine whether the request shall be forwarded. The Dispute Resolution Panel or Review Panel shall also have the right, at any time, to request an opinion from the Commission on Theology and Church Relations or the Commission on Constitutional Matters. Any opinion so requested shall be rendered within 30 days or such greater time as the Dispute Resolution Panel may allow. When an opinion has been requested, the time limitations will not apply until the opinion has been received by the parties. Any opinion received from the Commission on Theology and Church Relations and the Commission on Constitutional Matters must be followed by the Dispute Resolution Panel or Review Panel.

(h) Any member participating in this bylaw procedure who intentionally and materially violates any of the requirements in this bylaw or is persistent in false accusations is subject to the disciplinary measures as set forth in the appropriate Bylaw sections 2.14-2.17. Any member of the Synod who has personal factual knowledge of the violation shall inform the appropriate district president as the ecclesiastical supervisor. Violations of the prohibition against publicity while a matter is still undecided or while an appeal is contemplated or pending (Bylaw 1.10.18.1 (d) above) by any persons involved are specifically included as a violation subject to the same disciplinary measures set forth in the Bylaws.

In consultation with the Secretary of the Synod and the Council of Presidents, the Commission on Constitutional Matters shall amend as necessary the Standard Operating Procedures Manual that serves as a comprehensive procedures manual for Bylaw section 1.10, Dispute Resolution of the Synod.

OPPOSITION BRIEF

No. 10-553

In the Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH & SCHOOL, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the judicially recognized "ministerial exception" to the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (42 U.S.C. 12101 *et seq.*) bars review of the termination of a parochial school teacher who, although formally titled a commissioned minister, teaches primarily secular classes and performs the same job duties as noncommissioned lay teachers.

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In the Supreme Court of the United States

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HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH & SCHOOL, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 597 F.3d 769. The opinion of the district court (Pet. App. 31a-53a) is reported at 582 F. Supp. 2d 881. The district court's opinion denying the motion for reconsideration (Pet. App. 54a-61a) is not published in the *Federal Supplement* but is available at 2008 WL 5111861.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 2010. A petition for rehearing was denied on June 24, 2010 (Pet. App. 62a-63a). On September 2,

2010, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including October 22, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondent Cheryl Perich filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), alleging that petitioner dismissed her as a teacher in violation of Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 327 (42 U.S.C. 12101 *et seq*). Pet. App. 9a. The EEOC sued petitioner for unlawful retaliation under the ADA, and Perich intervened. *Id.* at 9a-10a. The district court granted summary judgment to petitioner, but the court of appeals vacated and remanded. *Id.* at 10a, 25a.

1. Petitioner, an ecclesiastical corporation affiliated with the Lutheran Church-Missouri Synod (LCMS), operates a church and school in Redford, Michigan. Pet. App. 3a. The school serves children in pre-school through the eighth grade. *Ibid.* Petitioner's teachers are classified as "contract" teachers or "called" teachers. *Ibid.* Contract teachers are hired by the school's board for one-year renewable terms of employment, while called teachers are usually hired on an open-ended basis by the voting members of the church congregation, at the recommendation of its Board of Education, Board of Directors, and Board of Elders. *Ibid.* Petitioner employs staff, including teachers, who are not Lutheran, and requires all teachers—called or contract, Lutheran or not—to perform the same job duties. *Id.* at 5a.

A teacher becomes a called teacher by completing a course of study, called a "colloquy," at a Lutheran col-

lege and earning a certificate of admission into the teaching ministry of the LCMS. Pet. App. 3a. Called teachers are often tenured and cannot be summarily dismissed without cause. *Ibid.* Called teachers also may, under certain circumstances, claim a "housing allowance" on their income taxes, which reduces the amount of their taxable income. *Ibid.* Once hired, or "called," by a congregation, the teacher receives the title of "commissioned minister." *Ibid.*

In July 1999, petitioner hired Perich as a contract teacher to teach kindergarten for the 1999-2000 school year. Pet. App. 3a. In February 2000, Perich completed the required colloquy classes and became a called teacher. *Id.* at 3a-4a. Her employment duties remained identical to the ones she performed as a contract teacher. *Id.* at 4a.

Perich taught kindergarten for the next three years, and then fourth grade during the 2003-2004 school year. Pet. App. 4a. As she had done as a contract teacher, Perich taught secular subjects using secular textbooks; she taught math, language arts, social studies, science, gym, art, and music. *Id.* at 4a-5a. Perich also taught computer skills to her fourth-grade class. *Id.* at 4a. Music instruction included secular music theory and instruction in playing the recorder using the same music book as was used in the local public school. *Ibid.* Perich seldom introduced religion in her teaching of secular subjects. *Id.* at 5a (noting that Perich could recall only two instances in which she introduced religion into secular subjects).

In addition to the secular classes, Perich taught a religion class four days a week for 30 minutes and attended a chapel service with her class once a week for 30 minutes. Pet. App. 4a. She led each class in prayer

three times a day for a total of approximately five or six minutes. *Ibid.* During her final year, Perich's fourth-grade class engaged in a devotional activity for five to ten minutes each morning. *Ibid.* In all, activities devoted to religion consumed approximately 45 minutes of the seven-hour school day. *Ibid.* Approximately twice a year, Perich led the chapel service in rotation with other teachers, who all took turns leading chapel services regardless of whether they were called or contract, Lutheran or non-Lutheran. *Id.* at 4a-5a.

Perich was assigned to teach third and fourth grade for the 2004-2005 school year. In June 2004, Perich suddenly became ill and was hospitalized. Pet. App. 5a. By August, Perich's doctors had not yet reached a definitive diagnosis. *Ibid.* The school's principal, Stacey Hoeft, assured Perich that she would "still have a job with us" when she regained her health. *Ibid.* Perich applied for disability benefits and began a disability leave of absence at the beginning of the 2004-2005 school year. *Ibid.*

During her leave, Perich regularly provided Hoeft with updates about her medical condition and progress. Pet. App. 5a. In December 2004, Perich informed Hoeft that she had been diagnosed with narcolepsy and that her neurologist estimated that she would be able to return to work once her medications were adjusted, a process that usually takes about two months. *Id.* at 6a. In January 2005, Perich notified Hoeft "that she had discussed her work day and teaching responsibilities with her doctor, and he had assured her that she would be fully functional with the assistance of medication." *Ibid.*

On January 27, 2005, Perich notified Hoeft by email that she would be able to return to work between February 14 and February 28. Pet. App. 6a. Later that day,

Hoeft responded that she was surprised to hear Perich would be able to return so soon and "expressed concern that Perich's condition would jeopardize the safety of the students in her care." *Ibid.* Hoeft also informed Perich that once she was able to return, she would not teach third and fourth grades, because Hoeft had contracted a substitute to teach through the end of the year. *Id.* at 6a-7a.

Three days later, petitioner held its annual congregational "shareholder" meeting. Pet. App. 7a. Hoeft and the school's board told the voting members that it was unlikely that Perich would be physically capable of returning to the classroom that year or the next. *Ibid.* The congregation then adopted the school board's proposal that Perich be asked to "accept a peaceful release agreement" under which she would resign in exchange for the congregation's agreement to pay a portion of her health benefits through December 2005. *Ibid.*

On February 8, 2005, Perich received from her doctor a written release to return to work without restrictions on February 22, 2005. Pet. App. 7a. The next day, school board chairman Scott Salo called Perich to arrange a meeting to discuss her employment. *Ibid.* Perich asked instead to meet with the entire board, and a meeting was convened on February 13, 2005. *Ibid.* At the start of the meeting, Salo presented Perich with the proposal that she resign. *Ibid.* In response, Perich produced her unrestricted medical release, and said that she wanted to return to work on February 22, 2005, particularly because, as of that date, she would no longer be eligible for disability coverage. *Id.* at 7a-8a. The board urged Perich to reconsider and asked that she email her decision by February 21. *Id.* at 8a.

On February 21, Perich sent Hoeft an email confirming her decision not to resign and informing Hoeft that Perich planned to return to work the next day, February 22, 2005. Pet. App. 8a. Perich reported for work the next morning. *Ibid.* Petitioner's employee handbook stated that an employee's "[f]ailure to return to work on the first workday following the expiration of an approved leave of absence may be considered a voluntary termination." *Ibid.* Because Perich had informed petitioner that her doctor had released her to return to work as of February 22, Perich was concerned that her failure to report on that day might be construed as a resignation. *Ibid.*

Hoeft directed Perich to leave the school, and Perich complied once she obtained written confirmation that she had reported to work and was instructed to leave. Pet. App. 8a. The letter, signed by Hoeft and Salo, said that Perich "had provided improper notification of her return to work" and "asked that she continue her leave" while "the congregation * * * develop[ed] a possible plan for her return." *Ibid.* Perich then left the school grounds.

Later that day, Hoeft called Perich at home, informing her that she likely would be fired. Pet. App. 8a. During their conversation, Perich told Hoeft that she had spoken with an attorney and if they were unable to reach a compromise she intended to "assert her legal rights" against discrimination based on disability. *Ibid.* In an email to Hoeft that evening, Perich said that she had seen her doctor the previous day and he had confirmed that she was healthy and ready to return to work. *Ibid.* Following the school board's meeting on the evening of February 22, 2005, Salo sent Perich a letter "describing Perich's conduct as 'regrettable' and indicating

that the Board would review the process of rescinding her call based on her disruptive behavior." *Id.* at 9a.

On March 19, 2005, Salo informed Perich by letter that a congregational meeting was scheduled for April 10, 2005, and that the school board would recommend terminating her employment at that time. Pet. App. 9a. As grounds for termination, the letter cited "Perich's insubordination and disruptive behavior on February 22, 2005" and said that Perich had "'damaged, beyond repair' her working relationship with Hosanna-Tabor by 'threatening to take legal action.'" *Ibid.* At the congregational meeting on April 10, 2005, the congregation voted to rescind Perich's call, and on the next day, Salo informed Perich of her termination. *Ibid.*

2. Perich filed a charge with the EEOC alleging discrimination and retaliation in violation of the ADA. Pet. App. 9a. On September 28, 2007, the EEOC filed suit against petitioner, and Perich later intervened. *Id.* at 9a-10a; see 42 U.S.C. 12117(a) and 2000e-5(f)(1). Both the EEOC and Perich claimed unlawful retaliation under the ADA; Perich also claimed retaliation in violation of Michigan law. *Ibid.*

On cross-motions for summary judgment, the district court granted petitioner's motion, concluding that the ADA retaliation claim was barred by the judicially created "ministerial exception." See Pet. App. 41a, 53a. The court reasoned that Perich was a "ministerial employee" and that adjudication of her retaliation claim "would risk infringing upon Hosanna-Tabor's right to choose its spiritual leaders." *Id.* at 52a, 53a (internal citation, quotation marks, and alteration omitted).

3. The court of appeals vacated the district court's judgment and remanded for further proceedings. Pet. App. 25a. The court noted that "[t]o determine whether

an employee is ministerial"—and therefore barred by the ministerial exception from litigating employment claims against her religious employer—"this Circuit has instructed courts to look at the function, or 'primary duties' of the employee * * * rather than the fact of ordination." *Id.* at 16a-17a (quoting *Hollins* v. *United Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir.), cert. denied, 552 U.S. 857 (2007)).

The court of appeals noted that "the overwhelming majority of courts that have considered the issue have held that parochial school teachers such as Perich, who teach primarily secular subjects, do not classify as ministerial employees for purposes of the exception," Pet. App. 17a, and that, "when courts have found that teachers classify as ministerial employees for purposes of the exception, those teachers have generally taught primarily religious subjects or had a central role in the spiritual or pastoral mission of the church," *id.* at 18a-19a. The court concluded that the district court in this case erred in classifying Perich as a ministerial employee in light of undisputed evidence that: "Perich's employment duties were identical when she was a contract teacher and a called teacher"; "she taught math, language arts, social studies, science, gym, art, and music using secular textbooks" and "seldom introduced religion into secular discussions"; "teachers leading chapel or teaching religion were not required to be called or even Lutheran, and, in fact, at least one teacher was not"; and "activities devoted to religion"—such as religious instruction and prayer—"consumed approximately forty-five minutes of the seven hour school day." *Id.* at 19a-20a. Based on this record, the court found it "clear that Perich's primary function was teaching secular subjects, not 'spreading the faith, church governance, supervision of a reli-

gious order, or supervision or participation in religious ritual and worship.'" *Id.* at 20a (citation omitted).

Judge White concurred. Pet. App. 26a-30a. While she "read the relevant cases as more evenly split than [did] the majority," she agreed that "the ministerial exception does not bar this ADA action." *Id.* at 26a (footnote omitted). She explained that this case differs from other cases in which courts found parochial school teachers to be ministerial employees because "there is evidence here that the school itself did not envision its teachers as religious leaders, or as occupying 'ministerial' roles." *Id.* at 29a. Judge White noted that petitioner's "teachers are not required to be called or even Lutheran to teach or to lead daily religious activities," and that "the duties of the contract teachers are the same as the duties of the called teachers." *Ibid.* For that reason, Judge White concluded, "even courts that have found ministerial plaintiffs who have daily schedules that have roughly the same ratio of religious to non-religious activities as Perich would find that the ministerial exception should not apply here." *Id.* at 30a.

ARGUMENT

Petitioner renews its contention that its decision to terminate Perich is rendered judicially unreviewable by the ministerial exception to the ADA. The court of appeal correctly rejected that contention, and its decision does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. The ADA prohibits discrimination and retaliation by "covered entit[ies]" and "person[s]" respectively, including religious institutions and persons employed by religious institutions. See 42 U.S.C. 12112(a) ("covered

entity" may not discriminate on the basis of disability); 42 U.S.C. 12203(a) ("No person shall discriminate against any individual" in retaliation for protected activity.); 42 U.S.C. 12111(2) ("covered entity" includes an "employer"); 42 U.S.C. 12111(7) (cross-referencing 42 U.S.C. 2000e) (definition of "person"). The statute includes certain "[d]efenses" for religious entities, but neither is applicable here. 42 U.S.C. 12113(c) ("Religious entities" may give "preference in employment to individuals of a particular religion" and may "require that all applicants and employees conform to the religious tenets of such organization.").[1]

In addition to the express statutory defenses for religious entities, the courts of appeals have recognized a

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[1] The EEOC's ADA regulations explain:

> Religious organizations are not exempt from title I of the ADA or [these regulations]. A religious [entity] may give a preference in employment to individuals of the particular religion, and may require that applicants and employees conform to the religious tenants of the organization. However, a religious organization may not discriminate against an individual who satisfies the permitted religious criteria because that individual is disabled. The religious entity, in other words, is required to consider qualified individuals with disabilities who satisfy the permitted religious criteria on an equal basis with qualified individuals without disabilities who similarly satisfy the religious criteria.

29 C.F.R. Pt. 1630, App.; accord H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 76 (1990) (House Report).

The ADA's legislative history indicates an intent that the ADA's prohibition on discrimination be "interpreted in a manner consistent with title VII * * * as it applies to the employment relationship between a religious organization and those who minister on its behalf." House Report at 75-76; see S. Rep. No. 116, 101st Cong., 1st Sess. 42 (1989) (same). Title VII provides that religious schools may "hire and employ employees of a particular religion," 42 U.S.C. 2000e-2(e)(2), but does not otherwise provide an exemption for religious institutions.

constitutionally rooted "ministerial exception" barring adjudication of certain claims regarding the employment relationship between religious institutions and ministers and other ministerial employees. See, *e.g.*, *McClure* v. *Salvation Army*, 460 F.2d 553, 559, 560 (5th Cir.) ("The minister is the chief instrument by which the church seeks to fulfill its purpose. * * * [A]pplication of the provisions of Title VII to the employment relationship * * * between a church and its minister would result in an encroachment by the State into an area of religious freedom."), cert. denied, 409 U.S. 896 (1972). The ministerial exception does not, however, bar all employment claims against religious institutions. See *Rayburn* v. *General Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171-1172 (4th Cir. 1985) ("[C]hurches are not—and should not be—above the law. * * * Their employment decisions may be subject to Title VII scrutiny, where the decision does not involve the church's spiritual functions."), cert. denied, 478 U.S. 1020 (1986).

2. After conducting a fact-intensive examination of Perich's "function, or 'primary duties'" within the school, the court of appeals in this case concluded that the ministerial exception does not bar review of Perich's allegedly retaliatory termination in violation of the ADA because she was not a ministerial employee. Pet. App. 16a-23a. The court found significant that Perich's duties were "identical" when she was a contract teacher and a called teacher; that, as a general matter, the primary duties of called teachers were "identical" to those of contract teachers; that Perich taught multiple secular subjects using secular textbooks; and that religious instruction comprised a small part of the school day. *Id.* at 19a, 23a; see *id.* at 34a. The fact that Perich led chapel twice a year in rotation with other teachers did not make her

a minister for purposes of the ministerial exception, the court noted, since even non-Lutheran secular teachers performed this role. *Id.* at 19a-20a.

The court's fact-intensive determination that the ministerial exception does not bar claims concerning Perich's termination, given the marked similarity between her duties and those of non-commissioned lay teachers, is correct and does not warrant further review.

3. Petitioner contends that there is a conflict among the courts of appeals about whether applicability of the ministerial exception should be determined by a "'primary duties' test." Pet. 11. As explained below, petitioner did not adequately preserve her challenge to the validity of the "primary duties" test below, so this case does not properly present this question. In any event, despite some variations in courts' articulations of the governing test, there is no conflict that warrants this Court's review. Moreover, every published court of appeals decision has found the exception inapplicable to claims like the one at issue here, concerning a teacher of primarily secular subjects at religious schools. Petitioner offers no persuasive reason to believe that the outcome of this case would be different in any other circuit.

a. As petitioner notes, the Third, Fourth, Sixth, and D.C. Circuits have held that in evaluating an employee's eligibility for the ministerial exception courts should examine whether "her primary duties include 'teaching, spreading the faith, church governance, supervision of a religious order, or supervision of participation in religious ritual and worship.'" *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 304 n.6 (3d Cir. 2006) (quoting *Rayburn*, 772 F.2d at 1169), cert. denied, 550 U.S. 903 (2007); see *Rayburn*, 772 F.2d at 1169 (4th Cir.); Pet. App. 16a-17a

(6th Cir.); *EEOC* v. *Catholic Univ. of Am.*, 83 F.3d 455, 465 (D.C. Cir. 1996).

Although petitioner contends that the Eighth and Tenth Circuits follow a "case-by-case" approach, both courts have also relied on examination of the employee's primary duties. See *Skrzypczak* v. *Roman Catholic Diocese*, 611 F.3d 1238, 1243 (10th Cir. 2010) (discussing employee's "job description, which included a list of her primary duties," and concluding that the plaintiff's position was "'important to the spiritual and pastoral mission of the [Diocese]'") (quoting *Rayburn*, 772 F.2d at 1169) (alteration in original), petition for cert. pending, No. 10-769 (filed Nov. 5, 2010); *Scharon* v. *St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 363 (8th Cir. 1991) (concluding that employee's "position as Chaplain [was] primarily a 'ministerial' position"); see also *Alcazar* v. *Corporation of the Catholic Archbishop*, No. 09-35003, 2010 WL 5029533, at *1 (9th Cir. Dec. 10, 2010) (en banc) (identifying Tenth Circuit as a court that "utilize[s] the 'primary duties' test" and the Eight Circuit as one that "use[s] a version" of it).

b. Petitioner argues that the court of appeals' application of the primary duties test in this case squarely conflicts with decisions of the Second, Fifth, Seventh, and Ninth Circuits, all of which, it contends, have rejected the "primary duties" test in favor of other approaches. That is incorrect.

After the petition was filed in this case, the en banc Ninth Circuit unanimously vacated the portion of the panel decision in *Alcazar* v. *Corporation of the Catholic Archbishop*, 598 F.3d 668 (2010), on which petitioner relies (Pet. 12). See 2010 WL 5029533, at *1. The en banc court declined to "adopt a general test for determining whether a person is a 'minister'" because the

employee at issue (a church seminarian) was "a minister under any reasonable interpretation of the exception." *Ibid.*

Similarly, the Second Circuit has found it unnecessary to adopt a general test on the scope of the ministerial exception. In *Rweyemamu* v. *Cote*, 520 F.3d 198 (2008), that court "agree[d] that courts should consider the 'function' of an employee, rather than his title or the fact of his ordination," but, in dicta, said such an approach could prove "too rigid," depending on "the nature of the dispute." *Id.* at 208.[2] The court found it unnecessary, however, to "attempt to delineate the boundaries of the ministerial exception" because the plaintiff before it (a priest who contended that his bishop "misapplied canon law in denying him a requested promotion," *id.* at 199) "easily f[ell]" within the exception. *Id.* at 209.

Petitioner argues that the Fifth Circuit "ignore[d]" the primary duties test and "appl[ied] a different test." Pet. 12 (citing *Starkman* v. *Evans*, 198 F.3d 173, 176-177 (1999), cert. denied, 531 U.S. 814 (2000)). But in *Starkman*, the court stated that to determine whether the ministerial exception controls, the court will "examine the employment duties and requirements of the plaintiff as well as her actual role at the church" and that the ministerial exception applies to employees "whose *primary functions* serve its spiritual and pastoral mission." 198 F.3d at 175-176 (emphasis added) (citing *Rayburn*, 772 F.2d at 1169, and *Catholic Univ. of Am.*, 83 F.3d at

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[2] In particular, the Second Circuit expressed concern that a "too rigid" application of a functional approach could lead to exclusion of some claims by lay persons that were rooted in religious doctrine from the ministerial exception while at the same time including straightforward tort or contract claims by ordained ministers. *Rweyemamu*, 520 F.3d at 208. Neither circumstance was presented in that case.

461). The Fifth Circuit concluded that a church choirmaster and music director—who was hired based upon religious criteria, planned worship liturgy, coordinated church and worship activities related to the church's music ministry, performed many other religious duties, and ministered to ailing parishioners—was a "spiritual leader" for purposes of the ministerial exception. *Id.* at 176-177. The Fifth Circuit, like the Sixth Circuit in this case, considered whether the plaintiff's primary duties were secular or religious, noting that the plaintiff in an interrogatory "list[ed] twenty-one duties under the category of religious or worship-oriented job duties, compared to only three entries for nonreligous, nonworship-oriented, or secular duties" and also "list[ed] nineteen of the twenty[-]one religious tasks as 'essential,'" while she designates all of her three nonreligious duties as 'non essential.'" *Id.* at 176.[3]

Finally, the Seventh Circuit likewise has held that "[i]n determining whether an employee is considered a minister for the purposes of applying [the ministerial]

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[3] Petitioner also contends (Pet. 23-24 & n.3) that the Fifth Circuit applied a "different test" in *Combs* v. *Central Texas Annual Conference of the United Methodist Church*, 173 F.3d 343 (1999), and "cited or discussed the cases applying the primary duties test, but [did not] adopt it." The question before the Fifth Circuit in *Combs* was not whether the plaintiff was a minister, see *id.* at 345 n.1 ("All parties agree that, at least for the purposes of this appeal, the following facts are true: Reverend Combs was a member of the clergy performing traditional clerical functions."), but whether the ministerial exception itself survived this Court's decision in *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990). See *Combs*, 173 F.3d at 345 ("The question before us is whether the Free Exercise Clause of the First Amendment deprives a federal court of jurisdiction to hear a Title VII employment discrimination suit brought against a church by a member of its clergy.").

exception, we do not look to ordination but instead to the function of the position." *Alicea-Hernandez* v. *Catholic Bishop*, 320 F.3d 698, 703 (2003). In *Alicea-Hernandez*, the court concluded the ministerial exception applied to the Hispanic Communications Manager of the Archdiocese of Chicago whose duties included composing media releases; composing correspondence for the Cardinal; composing articles for Church publications; and translating Church materials into Spanish, among other things, because her "role [as] press secretary is critical in message dissemination, and a church's message * * * is of singular importance." *Id.* at 703-704.

In a subsequent case, the Seventh Circuit considered whether ordained ministers of the Salvation Army who administered an Adult Rehabilitation Center were barred by the ministerial exception from bringing suit under the minimum-wage and overtime provisions of the Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (29 U.S.C. 201 *et seq.*). See *Schleicher* v. *Salvation Army*, 518 F.3d 471, 474 (7th Cir. 2008) (Posner, J.). The court concluded that the ministerial exception applied, explaining that the evidence showed that "a Salvation Army Adult Rehabilitation Center is a church, and, like a church, it is administered by church officials." *Id.* at 476. The court rejected plaintiffs' argument that the Adult Rehabilitation Center's operation of thrift shops altered the analysis, noting that "the commercial tail must not be allowed to wag the ecclesiastical body," particularly given the "spiritual dimension" of the commercial activities at issue. *Id.* at 477-478.

Although petitioner describes that analysis as a "totally different approach," Pet. 25, the Seventh Circuit's fact-intensive inquiry into the nature of the position at issue is not materially different from that conducted by

other courts. The court in *Schleicher* found the ministerial exception applicable to "properly ordained ministers" whose jobs comprised "'preaching,' 'leading worship singing,' 'overseeing or leading daily devotions,' 'overseeing or teaching Bible studies' to the residents, 'overseeing or conducting Christian living classes' for them, and teaching 'soldiers classes,' which are classes for prospective Salvation Army ministers." 518 F.3d at 477, 478. Such ministers likely would fall within the ministerial exception under any court's approach.

c. In any event, petitioner fails to demonstrate that this case would have been decided differently in any other circuit. Every published court of appeals decision to address the question (including those from the Second, Fifth, and Ninth Circuits) holds that parochial school faculty who, like Perich, are assigned to teach primarily secular subjects, are not covered by the ministerial exception.[4]

[4] See *Geary* v. *Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 331 (3d Cir. 1993) (Catholic elementary school teacher, "notwithstanding [her] apparent general employment obligation to be a visible witness to the Catholic Church's philosophy and principles"); *DeMarco* v. *Holy Cross High Sch.*, 4 F.3d 166, 172-173 (2d Cir. 1993) (Catholic high school teacher, whose religious duties included leading class in prayers and attending mass); *DeArment* v. *D.L. Harvey*, 932 F.2d 721, 721-722 (8th Cir. 1991) ("'born-again' Christian" class supervisors and monitors who regard teaching as "their personal ministry" and "conduct prayer and counsel" students in "a self-study program that teaches all subjects from a biblical point of view"); *Dole* v. *Shenandoah Baptist Church*, 899 F.2d 1389, 1392, 1396-1397 (4th Cir.) (teachers at K-12 school "with a full-time curriculum that included instruction in Bible study and in traditional academic subjects into which biblical material had been integrated"), cert. denied, 498 U.S. 846 (1990); *Ritter* v. *Mount St. Mary's Coll.*, 814 F.2d 986, 988 n.1 (4th Cir.) (education professor's claims "did not present a significant risk of infringement upon the First Amendment rights of Mount Saint Mary's

Petitioner relies (Pet. 20-22) on the Fourth Circuit's non-precedential ruling in *Clapper* v. *Chesapeake Conference of Seventh-Day Adventists*, 166 F.3d 1208 (Table), No. 97-2648, 1998 WL 904528 (Dec. 29, 1998), cert. denied, 526 U.S. 1145 (1999), the only federal appellate opinion to hold that the ministerial exception applies to a parochial school teacher. But as the court of appeals in this case explained, petitioner's invocation of the ministerial exception would fail even under the rationale of *Clapper* because "nothing in the record" indicates that petitioner relied on its teachers "to indoctrinate its faithful into its theology" in the way the school at issue in *Clapper* did. Pet. App. 22a. While the teacher in *Clapper* was required to "incorporate the teachings of the Seventh-day Adventist Church whenever possible" into her secular teaching, Perich only "twice in her career * * * introduced the topic of religion during secular discussions." *Id.* at 21a-22a (quoting *Clapper*, 1998 WL 904528, at *7); see *id.* at 29a (White, J., concurring); *id.* at 5a. In addition, unlike in *Clapper*, there was no "predominantly religious yardstick for qualification as a teacher" at Hosanna-Tabor; its "teachers [were] not required to be called or even Lutheran to teach or to

College"), cert. denied, 484 U.S. 913 (1987); *EEOC* v. *Fremont Christian Sch.*, 781 F.2d 1362, 1364, 1369-1370 (9th Cir. 1986) (teachers who occupied a "highly specialized role" at Christian school that church considered "a ministry" and "an integral part of the religious mission of the [c]hurch to its children"); *EEOC* v. *Mississippi Coll.*, 626 F.2d 477, 485-486 (5th Cir. 1980) (faculty and staff of Baptist college who were "expected to serve as exemplars of practicing Christians"); see also *Elvig* v. *Presbyterian Church*, 397 F.3d 7990, 797 (9th Cir. 2005) (Kozinski, J., concurring in the order denying rehearing en banc) (ministerial exception would not apply "to a female English teacher at a church-run elementary school").

lead daily religious activities." *Id.* at 29a (White, J., concurring).

Indeed, in an earlier published decision, *Dole* v. *Shenandoah Baptist Church*, 899 F.2d 1389, cert. denied, 498 U.S. 846 (1990), the Fourth Circuit concluded that pay discrimination claims of teachers at a K-12 school "with a full-time curriculum that included instruction in Bible study and in traditional academic subjects into which biblical material had been integrated," were not covered by the ministerial exception. *Id.* at 1396-1397. Similarly, the Fourth Circuit permitted a suit by a lay professor against a religious college, noting that the employment discrimination action "did not present a significant risk of infringement upon the First Amendment rights" of the college. See *Ritter* v. *Mount St. Mary's Coll.*, 814 F.2d 986, 988 n.1, cert. denied, 498 U.S. 846 (1987).

Petitioner also contends (Pet. 21-23) that the court of appeals' decision "squarely conflicts" with the decision of the Wisconsin Supreme Court in *Coulee Catholic Schools* v. *Labor & Industry Review Commission*, 768 N.W.2d 868, 872 (2009). That is incorrect. The court in *Coulee* agreed with other courts that "it is the function of the position that is primary" when considering whether the ministerial exception is applicable. *Id.* at 881 (citing *Rayburn*, 772 F.2d at 1168-1169). While the Wisconsin Supreme Court criticized a purely "quantitative analysis" of a teacher's duties, it, like other courts, engaged in a "highly fact-specific" examination of the plaintiff's position to determine "how important or closely linked the employee's work is to the fundamental mission of that organization." *Id.* at 883.

The court in *Coulee* made clear that it was "not giving a blanket exception to all religious school teachers"

and stressed that "[f]uture cases along these lines will necessarily be very fact-sensitive." 768 N.W.2d at 891. Critically, *Coulee*'s "heavily fact-dependent" inquiry (*id.* at 887), revealed that the teacher in question "made efforts to integrate Catholicism into all her subjects," both secular and religious. *Id.* at 891. Here, by contrast, Perich did not do so. Pet. App. 5a, 19a, 21a.[5]

4. Petitioner contends (Pet. 25-32) that the court of appeals' decision conflicts with decisions of this Court. That contention is incorrect and does not warrant this Court's review.

As an initial matter, the court of appeals' decision that the ministerial exception does not bar adjudication of the claim of unlawful retaliation against Perich does not involve "state interference in matters of church governance" (Pet. 26) as did *Gonzalez* v. *Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929); *Kedroff* v. *Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94 (1952); and *Serbian Eastern Orthodox* v. *Milivojevich*, 426 U.S. 696 (1979). All those decisions involved essentially ecclesiastical disputes over religious control, doctrines, practices, or property.[6] By

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[5] In addition, *Coulee*'s discussion of the federal Constitution was unnecessary to its disposition of the case. The employee there had asserted only a state-law claim, and the court found it barred by the ministerial exception based on Wisconsin's constitution, which has "specific and expansive language" and "provides much broader protections for religious liberty than the First Amendment." 768 N.W.2d at 887; see *id.* at 887 n.28 (noting that court's "holding that the Wisconsin Constitution provides * * * for the ministerial exception's broader application" would stand even if First Amendment were held inapplicable).

[6] *Gonzalez* involved a dispute over entitlement to certain income under a will that turned upon an ecclesiastical determination as to whether an individual would be appointed to a chaplaincy in the Roman Catholic Church, a "purely ecclesiastical matter[]." 280 U.S. at 16. *Kedroff*

contrast, this case presents an employment discrimination claim by a teacher at a religious school who taught primarily secular subjects and whose job responsibilities were indistinguishable from those of her non-commissioned lay colleagues.

Nor would adjudication of this case require a court to "decid[e] religious questions," as petitioner argues. Pet. 29. While petitioner's counsel now claims that petitioner dismissed Perich "for doctrinal reasons," *i.e.*, because she failed to utilize "the Synod's dispute resolution process," Pet. 30, "none of the letters that Hosanna-Tabor sent to Perich throughout her termination process reference church doctrine or the LCMS dispute resolution process," Pet. App. 24a. A court would "violate[] no constitutional rights by merely investigating the circumstances of [Perich's] discharge in this case, if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge." *Ohio Civil Rights Comm'n* v. *Dayton Christian Schs., Inc.*, 477 U.S. 619, 628 (1986).[7]

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involved a New York statute that put the Russian Orthodox churches of New York under the administration of the Russian Church in America and a subsequent dispute over who controlled the Saint Nicholas Cathedral in New York City, "strictly a matter of ecclesiastical government." 344 U.S. at 115. *Serbian Eastern Orthodox* involved a dispute over a defrocked bishop, the resolution of which "affect[ed] the control of church property in addition to the structure and administration of the American-Canadian Diocese." 426 U.S. at 698, 708-724.

[7] The Court in *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), was concerned that providing collective bargaining rights to parochial school teachers would be highly intrusive and would require constant monitoring touching all aspects of employment. See *id.* at 503 (noting that collective bargaining would permit negotiations over "nearly everything that goes on in the schools" (internal quotation marks and citations omitted)). An employment discrimination action brought by

Nor is it the case, as petitioner suggests, that a court impermissibly decides a religious question when it looks behind a defendant's assertions about "which duties [are] secular and which [are] religious," Pet. 29, by, for example, considering whether the duties in question are also performed by non-commissioned lay personnel. A contrary rule would illogically expand the scope of the ministerial exception, permitting a religious institution to deny all of its employees the protections of the employment discrimination laws simply by characterizing all of their duties as religious. See *Schleicher*, 518 F.3d at 478.

Likewise, the court of appeals' decision in this case creates no conflict with this Court's freedom of association cases. To the contrary, this Court has repeatedly held that prohibiting discrimination is "a state interest[] of the highest order" that generally outweighs any burden on the freedom of association that anti-discrimination laws impose. See *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623-624 (1984) (law requiring Jaycees to admit women did not violate their free exercise rights); *Board of Dirs. of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U.S. 537 (1987) (law requiring Rotary to admit women did not violate the First Amendment); *New York State Club Assoc.* v. *City of New York*, 487 U.S. 1 (1988) (upholding the constitutionality of a city ordinance prohibiting discrimination by clubs that have more than 400 members and provide regular meal service).[8] And as

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a teacher of secular subjects presents no similar concerns.

[8] Although this Court has recognized that freedom of expression protects a right to discrimination where the discrimination itself is integral to the expressive activity, see *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 651, 659 (2000); *Hurley* v. *Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 580-581 (1995), petitioner did

this Court has made clear, it is not the case "that all teaching in a sectarian school is religious." *Board of Educ.* v. *Allen*, 392 U.S. 236, 248 (1968). Where, as here, a teacher at a religious school teaches primarily secular subjects and performs duties indistinguishable from her non-commissioned lay colleagues, judicial review of her termination under the ADA creates no conflict with principles of associational freedom.

4. Finally, even if the matters petitioner raises otherwise warranted review, this would not be a suitable vehicle for two independent reasons.

a. Petitioner has waived its claim that the court of appeals erred by determining the applicability of the ministerial exception based on application of a "primary duties" test. Petitioner did not question the validity of that test before the court of appeals issued its decision; instead, petitioner accepted the test and argued that it should prevail under it. See Pet. C.A. Br. 29 ("As a general rule, the ministerial exception will be invoked if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship.") (quoting *Hollins* v. *United Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir.), cert. denied, 552 U.S. 857 (2007)). Indeed, petitioner below characterized the Sixth Circuit's decision in *Hollins*—which adopted the primary duties test, see 474 F.3d at

not tell Perich it was terminating her because discrimination or retaliation was integral to its message or its religious beliefs. Indeed, its policies said just the opposite: "[T]he LCMS personnel manual, which includes EEOC policy, and the Governing Manual for Lutheran Schools clearly contemplate that teachers are protected by employment discrimination and contract laws." Pet. App. 24a.

226—as a "prudent[]" application of the ministerial exception. Pet. C.A. Br. 28.[9]

b. The Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (42 U.S.C. 2000bb *et seq.*), prohibits the federal government "as a statutory matter" from "substantially burden[ing] a person's exercise of religion, 'even if the burden results from a rule of general applicability.'" *Gonzalez* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (quoting 42 U.S.C. 2000bb-1(a)). The statute creates an exception if the government "satisfies] the compelling interest test." *Ibid.* The Second Circuit has held that RFRA may provide a defense to certain employment discrimination claims asserted by ministers and that, if preserved, the merits of that defense should be considered before addressing the constitutionally based ministerial exception. See *Hankins* v. *Lyght*, 441 F.3d 96, 102-103 (2006); *Rweyemamu*, 520 F.3d at 202-204 (finding RFRA defense waived); see also *Catholic Univ. of Am.*, 83 F.3d at 467-470 (addressing defendant's RFRA defense as alternative to ministerial exception defense); cf. *Fusari* v. *Steinberg*, 419 U.S. 379, 387 n.13 (1975) (Court is "compelled" to consider "a statutory claim that may be dispositive before considering a difficult constitutional issue"). Petitioner in this case, however, has waived any claim under RFRA, and thus

[9] Petitioner challenged the "primary duties" test for the first time in its rehearing petition, see Pet. for Reh'g iv, but "[i]t has been the traditional practice of this Court • • • to decline to review claims raised for the first time on rehearing in the court below." *Wills* v. *Texas*, 511 U.S. 1097, 1097 (1994) (O'Connor, J., concurring in denial of certiorari); *Al-Ghorbani* v. *Holder*, 594 F.3d 546, 547 (6th Cir. 2010) ("[O]ur long-established rule is that this court will not consider arguments raised for the first time in a petition for rehearing.").

has not afforded the courts an opportunity to consider that possible nonconstitutional ground for the relief it seeks. For that reason as well, further review in this case is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2011

OPPOSITION BRIEF

No. 10-553

In the Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND CHERYL PERICH,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should apply the ministerial exception to the federal discrimination laws to constitutionally bar respondent Cheryl Perich from pursuing her retaliation claim under the Americans with Disabilities Act, where she served as an elementary teacher in Petitioner's parochial school, teaching secular subjects using secular materials and textbooks, performed relatively minor religious based duties that were also performed by contract and non-Lutheran teachers, did not serve in any pastoral or liturgical role, did not act as an intermediary between the church and its members, and Petitioner did not rely on her as the means for indoctrinating the faithful into its theology.

2. Whether this Court should apply the ministerial exception to the federal discrimination laws to constitutionally bar respondent Cheryl Perich from pursuing her retaliation claim under the Americans with Disabilities Act, where Petitioner perceived her as being disabled notwithstanding her doctor's authorization for her to return to work and refused to allow her to return to her position as an elementary school teacher, and, when she threatened to assert her federal rights against discrimination, Petitioner terminated her employment.

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STATEMENT OF THE CASE

Federal anti-discrimination laws, such as Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act, serve a compelling governmental interest in the "highest order," *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 460 (D.C. Cir. 1996), and apply to religious institutions, subject to exceptions inapplicable here. The two religion clauses in the first amendment preclude governmental interference in a religious institution's selection of its religious leaders. *See generally Serbian E. Orthodox Diocese for the United States & Can. v. Milivojevich*, 426 U.S. 696, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976). The judicially implied ministerial exception, as an exemption from the federal anti-discrimination laws, balances the state's compelling interest in eliminating discrimination and the church's constitutional right to manage its own affairs and choose its leaders. The circuits generally agree that ordained, practicing ministers fall within that exception, as well as other religious employees who serve the same type of function and role. In this case, the Sixth Circuit, relying on prior decisions from numerous circuits, correctly determined that Intervenor Cheryl Perich's position of an elementary school teacher did not have the same function or role of spiritual leaders and ordained ministers, and her retaliation claim under the ADA was not constitutionally barred.

STATEMENT OF FACTS

Perich's Employment and Duties with Hosanna-Tabor

Hosanna-Tabor Evangelical Lutheran Church and School, a Michigan corporation, operates a Lutheran church and elementary school and is jointly governed by a number of Boards, including a School Board of Education.[1] The school provides educational services to students from pre-school to eighth grade.

Teachers for Hosanna-Tabor School are hired in two different ways, contracted and "called." Contract and called teachers also differ in the manner in which they are hired. Contract teachers are hired directly by the Board of Education, while called teachers are hired by the voting members of the Congregation based on the recommendation of Hosanna-Tabor's various Boards, including the Board of Education.

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[1] While Petitioner is correct that Hosanna-Tabor is a member of The Lutheran Church - Missouri Synod, there is no evidence in the record that The Missouri Synod "is generally regarded as the most theological conservative of the major Lutheran bodies." In addition and contrary to a number of assertions in one of the amici briefs, there is no record evidence that the the purpose of the school is to inculcate the faithful or that parents spend money for a religious education. There are a number of different reasons why a parent may choose a Lutheran school, including the very modest cost and the latchkey program, and, although it is not in the record, the school's records show that 40 percent of the students were non-Lutheran, and an additional 5 percent do not go to church at all. Too much focus on the Lutheran religion may well limit the size of the student body.

Perich began her employment with Hosanna-Tabor in August 1999 as a contract elementary school teacher. After completing eight classes at Concordia College, Hosanna-Tabor hired her as a called Kindergarten Teacher, and starting in August, 2000, she taught Kindergarten until the end of the 2002-2003 school year. Perich taught fourth grade during the 2003-2004 school year.

Perich was not required to be a member of the Hosanna-Tabor Evangelical Lutheran Church in order to be employed as a contract or called teacher for the school. Her duties also did not include serving in a pastoral role to the congregation of the church. Moreover, Hosanna-Tabor did not even require all of its employees or teachers to be Lutheran, even though all teachers had the same duties.

As a contract teacher, and later as a called teacher, Perich's primary duties were the instruction of students in secular subjects, including Math, Language Arts, Social Studies, Science, Gym, Art and Music, using secular books. While Perich did teach a short religion program four days a week, the school did not require that its religion program be taught by a Lutheran or by a called teacher. In fact, the year before Perich began teaching the fourth grade, the fourth grade teacher who taught the religion program was not Lutheran. Both as when a contract and then a called teacher, her other religiously-related duties were attending chapel service with her students once each week, which she led two or three times a year, same as the other called, contract, and non-Lutheran teachers. Her only other religious related duties included five to ten minutes of devotional reading or listening, and participated with her students in a short

prayer each day in the morning, before lunch and at the end of the school day.

Perich's Disability and Leave of Absence

In the summer of 2004, Perich became ill during a Hosanna-Tabor golf event and began to undergo a series of medical tests to determine the cause. The school principal, Stacy Hoeft,[2] informed Perich that she should go out on a disability leave, but that she would "still have a job with us" when she returned. Perich agreed and took a disability leave of absence.

In about December 2004, a neurologist diagnosed Perich as having narcolepsy and began the process of prescribing and adjusting her medications so that she could return to a fully functioning state. Perich informed Hoeft of the same and that it would take about two months for her to return, without any restrictions. On January 10, 2005, Hoeft informed Perich that the school had hired a teacher to substitute for her during her disability.

On January 19, 2005, Hoeft asked Perich to "start thinking about what you'll be able to do" and "discuss it with your doctor." Hoeft also asked Perich whether she was "ever going to be allowed to drive again," stating that she "know[s] nothing about narcolepsy." On January 21, 2005, after Perich again clarified that she would be fully functional and able to return to work, Hoeft responded by stating that "I know you

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[2] According to Hoeft, the school "board was pretty much under me."

want to come back, I just didn't know if you would be ***able*** to."

In another email on January 27, 2005, Perich reported that she would be able to return to work sometime during the last two weeks of February 2005. Hoeft reacted with surprise, stating:

> "I am surprised to hear that you will be able to return so soon.... Is he [the doctor] going to permit you to come back full time? I (and the board especially) am going to have so many questions for you! I guess I wonder how you're not permitted to drive yet you can be responsible for the safety of a classroom of children. You can see why I'd be concerned.... I'm sorry if I don't sound excited for you. I guess the administrator in me is nervous about how to make the best of this situation for everyone." (RE 24-14, email messages, at 2; RE 24-7 at 18)

In closing, Hoeft informed Perich that she would "pass this information along to the Board of Ed and the Board of Directors."

Three days later, on January 30, 2005, Hosanna Tabor held its annual shareholder (congregation) meeting, and one of the points of discussion at the meeting was Perich, her medical condition, and a proposal to request her resignation and thus terminate her employment. Despite Perich having informed Hoeft that her medical condition had been diagnosed, that the condition was being fully treated with appropriate medication, and that she would resume work the following month, it was announced to the

voting members that neither Hoeft nor the School Board actually believed that Perich would be physically capable of returning to work that year or the next. Neither Hoeft nor the School Board, however, possessed or requested any medical information that actually supported their conclusion that Perich would be physically incapable of returning to work.

Nevertheless, after presenting the Boards and Hoeft's opinion that Perich was physically unable to work, it was recommended to the members a plan for the termination of Perich's employment, wherein her resignation would be requested in return for paying a portion of her medical premium payments through December 2005, with the intent that she would not return to work the following school year. The members approved the recommended plan.

On February 8, 2005, Perich's neurologist provided her with a written release to return to work without restrictions effective February 22, 2005, as expected. On the following day, Scott Salo, the School Board Chair, called Perich to arrange a meeting, to which she responded that she would instead prefer to meet with the entire School Board, and a School Board meeting was scheduled for February 13, 2005.

School Board Meeting

The meeting took place as scheduled, and Salo gave Perich a proposal for her resignation in return for a partial payment for her medical insurance. In response, Perich provided the Board with a copy her doctor's return to work note signed by her neurologist and informed the members that she was willing and

able to return to her job. There is no dispute that the note was a statement of the doctor's opinion that Perich was able to return to work, and that she could do so without restrictions. (RE 24-7 at 88; RE 24-18 at 43-44)

According to Hoeft, the Board was not satisfied with the doctor's return to work note because it did not include "education on the medical condition itself." (RE 24-7 at 31-32; *see also* RE 24-18 at 26) One of the Board members opined to the effect that he "wouldn't drive if I were you, not even if the doctor says you can." (RE 24-6 at ¶9) Another Board member stated "I have a medical background and I know that you have to be without symptoms for at least three months before you can be sure that the medicine is working well enough that you won't have symptoms.... If I were a parent who has a child in this school, I'd want you to be without symptoms for 6 months, with no episodes for 6 months or maybe even a year before I'd want my child in your class." (RE 24-6 at ¶9; RE 24-18 at 29-30, 43; RE 24-4 at 74-75) She also stated her "concern that it would frighten the children and they wouldn't know how to handle seeing Cheryl pass out, if that were to happen."

Perich reiterated that she was able and wanted to go back to work. Salo asked Perich to reconsider her decision not to resign, and Pranschke told Perich to email her decision by February 21, 2005.

On February 21, 2005, Perich sent an email to Hoeft stating that she had decided not to resign from her position at the School, and she intended to return to work the following day, consistent with her prior notice of her returning and the expiration of her six-

month disability leave. Pursuant to the School's handbook pertaining to medical leaves, her "[f]ailure to return to work on the first day following the expiration of an approved leave of absence may be considered a voluntary termination."

Upon arriving at the school the following morning, Perich went to the room where the teachers met each morning before classes began. Hoeft, however, told her to go home, saying to the effect of, "I'm not the only person that doesn't want you here. Parents have told me that they would be uncomfortable with you in the building." (RE 24-6 at ¶12) Due to the handbook provisions concerning leaves, Perich requested that she be provided with a written confirmation that she had tried to return to work. According to Hoeft, Perich's request for the written confirmation was appropriate. (RE 24-7 at 48)

Accordingly, Hoeft and School Board Chairman Salo provided Perich a letter extending her leave. The letter, however, was hostile in tone:

> Due to your improper notification to return to work, we are asking that you continue your leave on Tuesday, February 22, 2005 in order to allow the congregation a chance to develop a plan for your possible return. The congregational leaders will attempt to meet this evening to develop this plan. You will be informed of the steps that will be in place to allow for your possible return to work as soon as they developed.

The "congregational leaders" referred to in the letter were Hoeft, Salo and the other members of the Board

of Directors. Upon receiving the letter, Perich left the School.

Termination of Perich's Employment

Later that day, Perich emailed Hoeft stating again that she wanted to return to work, full time, just as the School had promised her. Hoeft responded by calling her, and Perich told Hoeft that although she had been trying to work out the issue with Hoeft and the Board, she had been talking to an attorney and intended to assert her legal rights against discrimination and, if necessary, file a lawsuit.

Later that evening, a meeting of the School Board was convened to discuss Perich's situation. Hoeft informed the Board of her telephone conversation with Perich, and the decision was made to terminate Perich's employment because she had threatened to file a lawsuit. Significantly, when Hoeft had earlier notified Bruce Braun, School Superintendent for the Michigan District Lutheran Church Missouri Synod, the district covering Hosanna-Tabor School, that Hosanna-Tabor was considering termination of Perich's employment, Braun advised Hoeft to seek the advice of a labor lawyer knowledgeable about disability issues because he was concerned that the termination would be illegal.

Braun's advice, however, was apparently completely ignored. On March 19, 2005, Salo sent Perich a letter informing her that a Voter's Meeting was scheduled for April 10, 2005 at which time a vote would take place to terminate her employment. As written by Salo, **"We are also requesting this because we feel that <u>you have damaged, beyond</u>**

repair, the working relationship you had with the Administration and School Board by threatening to take legal action against Hosanna-Tabor Lutheran Church and School." (RE 24-3, emphasis added) While the letter also refers to "due to insubordination and disruptive behavior on Tuesday, February 22, 2005," Congregational President Jim Pranschke admitted that Perich was not fired for that reason and that "the main action there was threatening to sue." (RE 24-4 at 90) In addition, Hosanna-Tabor did not choose doctrinal reasons for her termination, although that was one of the optional, prestated reasons stated in the letter. There was also no reference to an alternative dispute resolution or that filing a lawsuit would violate Lutheran beliefs.

Pranschke called a meeting of the members, and, at that April 10, 2005, meeting, recommended to the members that Hosanna-Tabor terminate Perich's employment. Following that recommendation, the members voted to terminate her employment.

District Court Proceedings

On cross-motions for summary judgment, the district court granted Hosanna-Tabor's motion. Applying the primary duties test for the ministerial exception adopted in *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir.), *cert denied* 552 U.S. 857, 128 S.Ct. 134, 169 L.Ed.2d 92, 76 USLW 3160 (2007), the district court reasoned that the "commissioned ministerial title" Hosanna-Tabor bestowed on Perich "suggests that the school values called teachers "as ministerial," and "it seems prudent in this case to trust Hosanna-Tabor's characterization of its own employee in the months and years *preceding* the events that led

to litigation." Accordingly, "[b]ecause Hosanna-Tabor considered Perich a 'commissioned minister'" and because Perich is employed by a "religious school with a sectarian mission," the district court concluded that "Perich was a ministerial employee."

Court of Appeals Proceedings

The Sixth Circuit reversed, applying the ministerial primary duties test to Perich's position of an elementary school teacher to determine the function of that position and her role at the school. As part of its analysis, the court reviewed and compared cases addressing parochial school teachers in numerous other circuits, with the far majority of those cases holding that teachers "who teach primarily secular subjects, do not classify as ministerial employees for purposes of the exception." 597 F.3d at 778. The court further noted that in cases where teachers were classified as ministerial employees, "those teachers have generally taught primarily religious subjects or had a central role in the spiritual or pastoral mission of the church." *Id.* at 779, *citing Catholic Univ. of Am.*, 83 F.3d at 463-65. The court found that the district court's factual findings were not clearly erroneous and Perich's primary duties were secular in nature and were identical to the duties of contract and even non-Lutheran teachers.

The court further examined whether Perich's position "is important to the spiritual and pastoral mission of the church," finding that there was nothing in the record that would indicate that the church "relied on Perich as the primary means to indoctrinate its faithful into its theology." *Id.* at 778, 781. The court further concluded that it would be "illogical and

contrary to the intention of the exception" to classify Perich as "ministerial," when contract and even non-Lutheran teachers performed the same duties and would thus also be deemed as "ministerial," excluding coverage from the discrimination laws.

The court further described Hosanna-Tabor as having "attempted to reframe the underlying dispute from the question of whether Hosanna-Tabor fired Perich in violation of the ADA to the question of whether Perich violated church doctrine by not engaging in internal dispute resolution," finding that the Missouri Synod's personnel manual "clearly contemplate that teachers are protected by employment discrimination" laws and "none of the letters that Hosanna-Tabor sent to Perich throughout her termination process reference church doctrine or the LCMS dispute resolution."[3] *Id.* at 781. The court further held that "Perich's claim would not require the court to analyze any church doctrine" or "be precluded from inquiring into whether a doctrinal basis actually motivated Hosanna-Tabor's actions." *Id.* at 781-782.

In Judge White's concurrence, she found that "tipping the scale" was the fact that "*the school itself* did not envision its teachers as religious leaders, or as occupying 'ministerial' roles," since the "teachers are not required to be called or even Lutheran to teach or to lead daily religious activities." *Id.* at 784.

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[3] The actual internal dispute resolution policy expressly states that it is not an exclusive remedy, except for theological, doctrinal, or ecclesiastical issues. (Appx. 80a, §1.10.3)

REASONS FOR DENYING THE WRIT

The Court should deny the petition for a writ of certiorari because this case does not present any of the circumstances upon which the Court grants certiorari. Under ordinary circumstances, the Supreme Court does not grant a petition for certiorari unless (1) there is conflict among the circuits, (2) the case is one of general importance, or (3) the lower courts' decisions are wrong in light of Supreme Court precedent. *See Hubbard v. U.S.*, 514 U.S. 695, 699 (1995) (granting the petition for certiorari when there was a split in the federal circuits); *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672 (1998) (granting the petition for certiorari when considering the "manifest importance of the case"); *Spears v. United States*, 129 S. Ct. 840, 842 (2009) (granting the petition for certiorari where the Eighth Circuit's decision on remand conflicted with a recent Supreme Court decision on issue).

Petitioner and amici point to a number of circuit decisions in decrying a conflict, but those cases are easily distinguishable on their facts, primarily involving plaintiffs who were practicing ministers, which was not the case here. In addition, Petitioner heavily relies on the Ninth Circuit's prior opinion in *Alcazar v. Catholic Archbishop of Seattle*, 598 F.3d 668 (9th Cir. 2010), although that opinion had been vacated, 617 F.3d 1101 (Aug. 5, 2010), and the portion of the original panel decision now relied upon by Petitioner has been subsequently rejected. *See Alcazar v. Catholic Archbishop of Seattle*, ___ F.3d ___, 2010 WL 5029533 (9th Cir. 2010) (en banc).

Moreover, as stressed by both the majority and concurrence opinions below, the specific unique facts found in this case were determinative. As found by the panel, the "undisputed evidence" showed that "all teachers at Hosanna-Tabor were assigned the same duties" regardless of whether the teachers were "called, contract, Lutheran, and non-Lutheran" and that "applying the [ministerial] exception to non-members of the religion and those whose primary function is not religious in nature would be both illogical and contrary to the intention behind the exception." *Hosanna-Tabor*, 597 F.3d at 781; *see also* 597 F.3d 784 (J. White, concurring) ("The fact that the duties of the contract teachers are the same as the duties of the called teachers is telling.").

In addition, while Petitioner now asks the Court to review and reject the primary duties test previously adopted by the Sixth Circuit, at no time prior to the issuance of the opinion below did Petitioner ask the panel to use a different test or advocate a different analysis.

Petitioner also cannot show any issue of general importance that was actually decided in this case. This and similar cases were predominately decided on their unique factual circumstances, and even though the ministerial exception has been utilized for the past forty years, there are a relatively small number of applicable cases. The paucity of the number of the cases applying the ministerial exception makes clear that this case does not exhibit general importance.

Finally, Petitioner and perhaps more importantly the amici are now attempting to use this case to obtain this Court's blessing for a subjective and deferential

test obviously preferred by religious employers. More specifically, they seek wide leeway to avoid the federal statutory prohibitions on discrimination. If successful, they will unilaterally be able to decide which of its employees will be not be protected by the discrimination laws, precluding any further inquiry by the courts. Those anti-discrimination laws, however, serve a compelling governmental interest, and free exercise rights must be weighed against those compelling interests. ***EEOC v. Mississippi College***, 626 F.2d 477, 488 (5th Cir. 1980); ***Wisconsin v. Yoder***, 406 U.S. 205, 92 S. Ct. 1526, 32 L.Ed.2d 15 (1972). Such a deferential approach would obviate the state's compelling interest and would be over inclusive as to which religious relationships would be protected by the first amendment.

I. The Appropriateness of the Primary Duties Test was Not Litigated Below

It is well established that "a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). While appellate courts are given the discretion to decide when to deviate from this general rule of waiver, *see Singleton*, 428 U.S. at 121, "prudential considerations" articulated by the Supreme Court counsel against hearing new arguments for the first time on appeal absent limited circumstances. For example, in *Hormel v. Helvering*, 312 U.S. 552, 556 (1941), the Court explained that this is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *See also, United*

States v. Ortiz, 422 U.S. 891 (1975) (declining to address scope of search and seizure case where the issue was raised for the first time in the petition for certiorari.)

These "prudential considerations" are particularly applicable here because, contrary to Petitioner's arguments, this case was never about whether the Sixth Circuit was utilizing the appropriate test or analysis in determining whether Perich should be classified as ministerial. All parties had relied upon and argued from the Sixth Circuit's prior decision in *Hollins*, wherein the court adopted the primary duties test. *See Hollins*, 474 F.3d 223 at 227 ("We agree with this extension of the rule [primary duties test] beyond its application to ordained ministers and hold that it applies to the plaintiff in this case, given the pastoral role she filled at the hospital.") After the panel issued its opinion and Petitioner having lost the battle, Petitioner for the first time advocated that a different test should be used, with that issue raised in a motion for reconsideration or hearing en banc. That motion was denied, without a single vote to rehear the case en banc to address this new issue. Accordingly, other than Petitioner in its motion for reconsideration, the parties have never briefed or argued the applicability of any other test, and that issue has not been decided below. Accordingly, this case presents a poor vehicle for Petitioner and the amici to address this issue in the first instance before this Court.

II. The Ministerial Exception to Federal Anti-Discrimination Laws

In promulgating the ADA, Congress intended that employees of religious institutions be protected from

discrimination based on disability and retaliation, with the sole exemption being that religious employers allowed a "preference in employment to individuals of a particular religion," and to "require that all applicants and employees conform to the religious tenets of such organization." 42 U.S.C. §12113(c); 42 U.S.C. §§12112(a) and 12203. Congress further intended that the ADA be applied to religious employers in the same manner as Title VII of the Civil Rights Act of 1964. *See* H.R. Rep. No. 485 part 2, 101st Cong., 2d Sess. 75-76 (1990). In turn, Title VII allows sectarian schools to prefer employees of a specific religion, but otherwise prohibits discrimination and retaliation as set forth in that statute. 42 U.S.C. §2000e-2(e)(2).

Almost forty years ago and eight years after the passage of Title VII, the Fifth Circuit first implied a religious-based exception to Title VII, when addressing whether that statute "applies to the employment relationship between a church and its ministers and, if applicable, whether the statute impinges upon the Religion Clauses of the First Amendment."[4] *McClure v. Salvation Army*, 460 F.2d 553, 554-555 (5th Cir. 1972). Finding that the application of Title VII would pose serious constitutional questions, the court chose to avoid those questions by holding that "Congress did not intend, through the nonspecific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and

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[4] Although *McClure* did not involve gender discrimination, it would not be surprising if the court was cognizant that several large religions, including Catholicism and the Lutheran religion, prohibit women from serving as priests.

minister." *Id.* at 560-561. As further found by the court, the "relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern." *Id.* at 558-559.

Since *McClure*, every circuit has adopted the ministerial exception.[5] *See Petruska v. Gannon Univ.*, 462 F.3d 294, 303-304 (3d Cir. 2006) (collecting cases). The circuits further agree that practicing ordained ministers, clergymen, rabbis, etc., fall within that exception, since the first amendment precludes governmental interference in the relationship between religious institutions and its leaders. *See generally Milivojevich*, 426 U.S. 696.

On the other end of the spectrum, the circuits who have addressed the issue have also held that lay employees of religious institutions do not fall within that exception and are protected by the federal anti-discrimination statutes, as Congress intended. *See, e.g. Alcazar*, 2010 WL 5029533 at *2; *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1282 (9th Cir. 1982) (all employment with a sectarian publishing company is not immune from EEOC scrutiny); *DeMarco v. Holy Cross High School*, 4 F.3d 166, 169 (2d Cir. 1993) ("majority of courts considering the issue have determined that application of the ADEA to religious institutions generally, and to lay teachers

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[5] The Seventh Circuit has renamed the exception to the "internal affairs doctrine." *Schleicher v. Salvation Army*, 518 F.3d 472, 474 (7th Cir. 2008)

specifically, does not pose a serious risk of excessive entanglement"); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) (Churches are not above the law, and "[t]heir employment decisions may be subject to Title VII scrutiny, where the decision does not involve the church's spiritual functions").

The circuits who have addressed the issue have also agreed that the exception is not limited to ordained ministers, but also encompasses those employees whose positions are functionally the same as ministers or serve in a pastoral role. *See e.g. Rayburn*, 772 F.2d at 1168; *Hollins*, 474 F.3d 223. In determining whether a religious employee is within that exception, the circuits have generally engaged in a factually intensive and objective analysis, relying on decisions from other circuits in determining the exception's applicability, regardless of the designation or name of a specific test. The circuits have focused on the function of the employee's position and "whether a position is important to the spiritual and pastoral mission of the church." *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 801 (4th Cir. 2000). *See also Starkman v. Evans*, 198 F.3d 173, 176 (5th Cir. 1999); *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 703-704 (7th Cir. 2003); *Weissman v. Congregation Shaare Emeth*, 38 F.3d 1038, 1045 (8th Cir. 1994) (exception does not bar discrimination claim because the "overwhelming majority of [the plaintiff's] responsibilities are wholly secular").

III. The Petition Should be Denied Because There is No True Conflict Between Circuits

In order to establish a true conflict between the circuits, the conflicting decisions must have been decided in opposite ways, based on the very similar and indistinguishable facts. Here, Petitioner argues that the referenced circuit cases are "factually indistinguishable," resulting in "directly conflicting results." (Petition, pp. 10-11) To say that those cases are "indistinguishable," however, is to take abstraction to its highest level.

Those "conflicting" cases involved practicing ordained ministers, clergymen, chaplains, and employees who participated in church rituals as plaintiffs. *See, e.g. Petruska*, 462 F.3d at 300, 397, fn. 10 (selection of university chaplain, who would perform spiritual duties); *Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008) (race claim made by African-American minister); *Alcazar v. Corp. of the Catholic Archbishop*, 2010 WL 5029533 at *3 (seminarian in training program for ordained ministers); *Starkman v. Evans*, 198 F.3d 173, 176-177 (5th Cir. 1999) (choir director who had been designated to be a ministerial presence to ailing parishioners, and she is part of an "integral part of worship services and Scripture readings"); *Schleicher*, 518 F.3d at 474, 477 (FLSA claim made by ordained ministers whose duties included preaching, leading worship singing, teaching Bible classes, and teaching new prospective ministers).

In this case, however, Perich was not an ordained minister and at no time did she act as an intermediary between the church and its congregation, lead or a

play a role in the church's spiritual rituals, participate in church governance, or provide pastoral services to congregation members. Instead, she was simply an elementary school teacher, primarily teaching secular subjects to kindergarteners and fourth graders utilizing secular texts, with very few, minor duties that are religious based. The only commonality between Perich and these cases is that Perich had been bestowed the title of a "commissioned minister." Yet such a title is neither material nor determinative. *See e.g. Rweyemamu*, 520 F.3d at 208 (courts should not rely on titles). Accordingly, those cases are readily distinguishable from the instant case, and cannot be relied upon in determining a conflict exists.

IV. This Case Was Decided on Unique Facts and Does Not Compel Supreme Court Review

Petitioner also ignores that *Hosanna-Tabor* is unique among the circuits, in several regards. First, the panel below relied upon the unique facts in this case. Specifically, the majority emphasized that all teachers at Hosanna-Tabor were assigned the same duties, regardless of being a "contract" teacher (without the commissioned minister title), "called" teacher, or even non-Lutheran. 597 F.3d at 781. To classify Perich as minister would necessarily mean that all Hosanna-Tabor teachers would not be protected by the anti-discrimination statutes, notwithstanding the fact that the teachers are not even Lutheran and whose "primary function is not religious." *Id.* The concurrence also found that those facts were determinative:

> Tipping the scale against the ministerial exception in this case is that, as the majority points out, there is evidence there that *the school itself* did not envision its teachers as religious leaders, or as occupying "ministerial" roles. Hosanna-Tabor's teachers are not required to be called or even Lutheran to teach or to lead daily religious activities. The fact that the duties of the contract teachers are the same as the duties of the called teachers is telling. This presence (or lack) of a predominantly religious yardstick for qualification as a teacher is a key factor in decisions finding the ministerial exception applicable and those finding it inapplicable alike.

Id. at 784.

This case is also unique in that Perich has direct evidence of retaliation, without having to rely on the *McDonnell-Douglas* shifting burden of proof. Perich may produce either direct or circumstantial evidence of retaliation. *DiCarlo v. Potter*, 358 F.3d 408, 414 (6th Cir. 2004) (Rehabilitation Act); *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1186 (6th Cir. 1996) (ADA). Direct evidence is "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999). Perich has presented direct evidence of retaliation in this case. The undisputed facts show that Perich opposed Hosanna-Tabor's discriminatory acts during the February 13, 2005 meeting when the School Board rejected her doctor's opinion and assumed that she was

still disabled and unable to work. It is also undisputed that when Hosanna-Tabor continued its discriminatory acts, Perich threatened to assert her legal rights and file a lawsuit. Finally, it is also undisputed that Hosanna-Tabor terminated her employment for the reason that she threatened to file a lawsuit to protect her legal rights against disability discrimination, as evidenced in Salo's March 19, 2005 letter.

This direct evidence sets this case apart from the cases relied upon by Petitioner. In a number of discrimination cases involving religious employees, courts have raised first amendment concerns arising at the pretext stage in a circumstantial evidence case, where religious beliefs and doctrines may be challenged. *See e.g. Rweyemamu*, 520 F.3d at 209. Other courts have allowed such claims, where the case presents a simple factual determination as to whether the religious reason or unlawful reason motivated the adverse employment decision. *See e.g. DeMarco*, 4 F.3d at 170-171; *Geary v. Visitation of Blessed Virgin Mary Parish Sch.*, 7 F.3d 324 (3d Cir. 1993). Under the unique facts of the instant case, however, Perich does not need to establish pretext or rely on the shifting burden of proof.[6]

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[6] Salo's March 19, 2005 letter provided four possible reasons for the termination. Two of those reasons included "persistent adherence to false doctrine" and "scandalous lifestyle which causes offense." Hosanna-Tabor did not select either of those religious reasons. Three years later, at the summary judgment stage of this case, Hosanna-Tabor alleged for the first time that Perich violated its religious doctrine by not pursuing alternative dispute resolution process, not previously mentioned before, and "Christians do not sue Christians." The panel below expressed skepticism as to this after-the-fact position, but, as in *Geary* and

V. No Circuit Has Determined that a Conflict Exists or has Expressly Rejected the Primary Duties Test

It is not uncommon that when a true conflict exists, one circuit or another will so state. That is not the case here. While Petitioner relies on the original decision in *Alcazar*, 598 F.3d 668 (9th Cir. 2010), wherein the Ninth Circuit expressly criticized and rejected the primary duties test, this decision was vacated, even before the Petition was filed. As it turns out, Petitioner's reliance on that case was premature, given that in its subsequent en banc decision, the Ninth Circuit neither rejected nor adopted that test. *Alcazar*, 2010 WL 5029533 (9th Cir. 2010). Instead, based on the specific facts of that case, involving a seminarian in the process of becoming an ordained minister, regardless of any specific test, the plaintiff clearly fell within the ministerial classification. *Id.* at *3.

Starkman, also relied upon by Petitioner, does not portray a true conflict, and the Fifth Circuit did not reject or criticize the primary duties test in that case. Instead, while there are some variations in its approach, the *Starkman* court looked at the function of the position and the role of the employee in the church's mission, which is the same analysis made by the circuits who utilized the primary duties test by name. 198 F.3d at 175-176 ("To determine whether Ms. Starkman qualifies as 'spiritual leader' for purposes of the ministerial exception, this court will

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DeMarco, held that the district court is not precluded from determining the true reason motivating Perich's termination.

examine the employment duties and requirements of the plaintiff as well as her actual role at the church," and the "ministerial exception encompasses all employees of a religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral mission").

Similarly, in *Schleicher*, the Seventh Circuit examined the actual function and duties of two ordained ministers worked for the Salvation Army and brought FLSA claims, finding that their duties included preaching, leading worship singing, teaching Bible studies, ministering to employees, teaching new potential ministers, and were employed by a church instead of the thrift shops and engaged in ecclesiastical administration. Given those circumstances, the court adopted a rebuttable presumption that those ordained ministers should be exempt from the FLSA. Notably, in a prior Seventh Circuit decision, *Alicea-Hernandez*, 320 F.3d 698, where the plaintiff was not an ordained minister, the court held that, for purposes of the exception, it would determine "the function of the position," and then inquire as to the duties and role of that position. *Id.* at 703-704. That is the same analysis used by circuits who have adopted the primary duties test by name.

In addition and contrary to Petitioner's assertion otherwise, the Second Circuit in *Rweyemamu* did not "reject" the primary duties test. As set forth in that case, the Second Circuit performs the same analysis as the Sixth Circuit and others do, but with small variations, consisting of considering whether the non-ministerial employee-employer relationship is so pervasively religious to raise first amendment concerns and allowing non-discrimination claims, such

as tort and contract claims, even if an employee is classified as ministerial. Neither of those variations are applicable here, and *Rweyemamu* is not a denunciation or rejection of the primary duties test.

Petitioner also cites to an unpublished case, *Clapper v. Chesapeake Conference of Seventh Day Adventists*, 166 F.3d 1208 (table), 1998 WL 904528 (4th Cir. Dec. 29, 1998),[7] as a decision critical of the primary duties test. In a subsequent, published decision, however, *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 306 (4th Cir. 2004), the Fourth Circuit affirmed its adoption of the primary duties test, same as adopted by the Sixth Circuit. Moreover, even if the *Clapper* decision held precedential weight, the determinative facts in that case were that the teachers, who were required to be tithe paying members of the religion, were charged with salvation of the children's souls through indoctrination and incorporated religion into the subjects, including teaching the Bible's story of creation in science class. As noted by the panel below, the "quality" referred to in the *Clapper* case was the religion's reliance on teachers indoctrinating the students into the Seventh-day Adventist Church's theology. *Hosanna-Tabor*, 597 F.3d at 781. Those facts are not present in the instant case.

Petitioner also relies upon a decision by the Wisconsin Supreme Court, *Coulee Catholic Schools v.*

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[7] Notably, in its local rules, the Fourth Circuit disfavors citation to its own unpublished decisions issued prior to January 1, 2007. See Local Rule 32.1; Local Rule 36 (standards for publication and limitations as to unpublished decisions).

Labor and Industry Review Comm., 768 N.W.2d 868 (Wis. 2009), as being a case critical of the "quantitative" approach allegedly used by some courts in applying the primary duties case. In *Coulee*, the court weighed not only the relative amount of time spent on religious duties, but also whether the the "position is important to the spiritual and pastoral mission of the church." *Id.* at 882, *quoting Rayburn*, 772 F.2d at 1169. Or, in the words of the court, a court should engage an "inquiry into how important or closely linked the employee's work is to the fundamental mission of that organization," and this "highly fact-specific" inquiry should include objective indicators, such as "[t]eaching, evangelizing, church governance, supervision of a religious order, and overseeing, leading, or participating in religious rituals, worship, and/or worship services." *Id.* at 883.

Petitioner and amici now argue that the Sixth Circuit, in applying the primary duties test, is only counting minutes in a day, describing this as a "quantitative" approach. This interpretation of the panel's decision below ignores the fact that, in addition to determining the actual amount of time spent on religious duties, the panel also took into account the function and role of the position in furthering the religion's mission:

> Other circuits have further instructed that courts must "determine whether a position is important to the spiritual and pastoral mission of the church." *See e.g.*, *Rayburn*, 772 F.2d at 1169.

* * *

> In this case, it is clear from the record that Perich's primary duties were secular, not only because she spent the overwhelming majority of her day teaching secular subjects using secular textbooks, but also because nothing in the record indicates that the Lutheran church relied on Perich as the primary means to indoctrinate its faithful into its theology.

Hosanna-Tabor, 597 F.3d at 778, 781. No circuit has relied upon counting minutes, utilizing the clock, in determining whether the function and primary duties of an employee are ministerial in nature. The concept of "primary" is not limited to time, but also encompasses the nature of the duties and role of the employee in the church's mission. This approach, taken below, includes the qualitative side of the analysis, which is consistent with the approach taken in *Coulee*.

VI. Published Circuit Cases have Consistently Held that Parochial School Teachers were not Ministerial

There are some variations between the various circuits in their analysis of the ministerial exception, including having the Fifth and Second Circuits adding additional factors, although each circuit has utilized a fact-specific inquiry in determining the function and role of the employee's position. Yet, in considering whether parochial school teachers who primarily teach secular subjects fall within the ministerial exception, the results have been remarkably consistent in finding the ministerial exception did not apply. *See EEOC v. Fremont Christian School*, 781 F.2d 1362, 1364, 1369-1370 (9th Cir. 1986) (elementary and high school

teachers); *DeMarco*, 4 F.3d at 172-163 (Catholic high school teacher); *Mississippi College*, 626 F.2d at 485-486 (faculty and staff of Baptist college); *Geary*, 7 F.3d at 331 (Catholic elementary school teacher); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392, 1396-1397 (4th Cir. 1990) (pay discrimination claim brought by teachers in an elementary and high school); *DeArment v. K.L. Harvey*, 932 F.2d 721, 721-722 (8th Cir. 1991) (wage claim brought by class supervisors and monitors).

VII. Petitioner's Preferred Test Would Provide Total Deference to Religious Employers

Throughout the Petition, a general theme is that any question as to an employee's actual duties or allowing judicial objective determinations as to her functions would violate either or both of the religious clauses, citing to this Court's decisions, such as *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979) and *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). In Petitioner and amici's view, the rule should be, much like the district court held below, that the government and courts should take the word of the religious institutions as to whether any particular employee should be considered ministerial and exempted from a plethora of laws governing the workplace, including the federal and state discrimination laws.

What is missing in that argument, however, is that the government has a compelling interest in eradicating unlawful discrimination, an interest in the "highest order." *Catholic Univ. of Am.*, 83 F.3d at 460. This issue comes up involving employment discrimination claims against religious employers, and

not in cases that have involved collective bargaining, church governance, religious beliefs, or church property. In the employment law arena, the circuit courts have developed and continue to develop the balance between those interests of the highest order, through the ministerial exception. Each of these cases have been necessarily fact specific, which means complete consistency is hard to accomplish. But the cost of not obtaining complete consistency in the decisions is the price of honoring and addressing both of those most important interests. On the other hand, the cost of complete consistency, obtained by providing total deference to religious employers, would be to ignore the state's compelling interest in eradicating unlawful discrimination.

The instant case is a clear example of the need to educate employers, religious or otherwise, and provide disincentives from discriminating against persons with disabilities, actual or perceived. The Principal and the School Board chose not to believe Perich's doctor that she was able and ready to return to work, replacing the doctor's opinion with their own. Their comments, including those that Perich may scare the children and parents do not want her in the building, evinces the exact same type of stereotypes and bias that prompted the passage of the ADA. When Perich complained that it was unlawful and asserted her federal rights, the School's immediate response was to fire her. This is a blatant violation of the ADA, and it had nothing to do with religion.

VIII. There is No Compelling Reason to Grant the Petition

Although the courts have applied the ministerial exception for almost forty years, relatively few cases have been brought that involve that exception.[5] These cases consist of a very small subset of discrimination claims, and very few religious institutions have been named as defendants. In addition, at least on the circuit level, most of the cases involve ordained ministers or clergymen, and it is even a smaller subset of the ministerial exception cases that involve plaintiffs such as Perich, who was not an ordained minister or otherwise provided pastoral or liturgical services to the members of the congregation. Accordingly, very few new cases would benefit this Court's review of this case.

In addition, the ministerial exception has been percolating through the district and circuit court levels for the past forty years, with those courts still refining and developing the scope of that exception. This Court has declined available opportunities to review this exception thus far, and there is no compelling reason to step into the fray now, since the developments continue to be made without this Court's supervision or creating any intolerable conflict. While some courts may desire some additional guidance, absent the type of deference desired by Petitioner and the amici through a blanket rule, these cases will continue to be fact specific cases that defy clear lines, since the courts

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[5] According to Petitioner's research, over the past five years, there have been on average 2.8 circuit court opinions and 8 district court opinions per year that involve the ministerial exception.

will be required to balance high order interests in the specific circumstances of each case.

Of course, and as noted above, Petitioner and amici would like total immunity from employment discrimination claims through their ability to designate which employees would be covered by the federal discrimination laws and which would not. They could avoid any potential liability based on their employment decisions, acting with impunity, and would be able to plan budgets and make reorganizations without having to review and determine if they are in fact acting lawfully. Accordingly, for Petitioner and amici, this case is quite important.

The problem with their reasoning, however, is that a number of corporations, businesses, and organizations would also like to benefit from such a rule and to plan without worrying as to violating the federal discrimination laws. But we, as a nation, have a compelling interest in eradicating unlawful discrimination and, if a corporation, business, or organization violates those laws by discriminating against its employees, the price to be paid is to compensate those employees for their losses.

The second fallacy in Petitioner and amici's logic is that there is only additional cost and liability if religious institutions have chosen to unlawfully discriminate against its employees. The applicable federal employment laws already allow leeway for religious employers to hire persons of a certain religion and believers of its doctrines. This Court's precedent and the ministerial exception also allow complete and total deference for religious institutions in employing,

retaining, or dismissing their religious leaders. As to their other employees, not performing ministerial duties, the only thing that those institutions need to do is to not make employment decisions based on membership of a protected class. In other words, do not discriminate on the basis of race, gender, ethnicity, disability, etc., and it would not cost them a dime.

CONCLUSION

For all of the forgoing reasons, respondent Cheryl Perich asks the Court to deny the writ.

Respectfully submitted,

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Dated: January 26, 2011

REPLY BRIEF

No. 10-553

In the Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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REPLY BRIEF FOR THE PETITIONER

Respondents do not dispute the propriety of the ministerial exception or its core rationale that courts should not decide who will perform the ministerial functions of religious organizations. They do not claim that the ministerial exception is confined only to pastors of congregations. Rather, they dispute the exception's boundaries.

On that issue, every judge below acknowledged conflicting authority. "At least one other circuit has found that this approach is too rigid," Pet. App. 16a n.7 (majority); "split authority in several areas," *id.* 26a-27a n.2 (White, J., concurring); "courts remain sharply divided," *id.* 43a (District Court). Even Respondents concede that there are "some variations" among the circuits, Federal Opp. 12 (Opp.), and that "courts may desire some additional guidance," Perich Opp. 31. The conflict is square, and this case is an excellent vehicle to address it.

I. There is a square conflict among the circuits and states.

Respondents claim there is no real conflict because all the circuits conduct a "fact-intensive" review of an employee's "primary duties." Opp. 12. This is like saying that all this Court's Establishment Clause cases are consistent because each involved a fact-intensive review of whether government supported religion. *Of course* all ministerial-exception cases review the facts and the employee's duties.

But the lower courts divide over the legal standards applicable to that review: (1) how to evaluate

the job and its duties, Pet. 13-14, and (2) whether to also consider the nature of the dispute, Pet. 14-16.

Each of these basic disagreements entails subsidiary disagreements. With respect to the job and its duties, courts disagree over, *inter alia*, whether the religious organization's characterization of duties as religious should receive any deference; the significance of the time spent performing unambiguously religious duties; and whether it matters that the duties could be performed by a person from another denomination. And when the employer offers a religious reason for a discharge, courts disagree over whether duties alone are dispositive, and whether courts can adjudicate claims of pretext.

The first set of splits is exemplified by *Schleicher* v. *Salvation Army*, 518 F.3d 472 (7th Cir. 2008). In *Schleicher*, the parties disputed whether the work of administering thrift shops was secular or religious, and whether those allegedly secular duties predominated over unambiguously religious duties like "leading worship singing," "leading daily devotions," and "teaching Bible studies." *Id.* at 477. The dispute here is substantially parallel: whether teaching the standard curriculum is secular or religious, and whether Perich's allegedly secular duties predominate over her unambiguously religious duties of leading prayers and daily devotions and teaching religion.

The Sixth Circuit rejected the Church's view that the standard curriculum has religious significance, rejected the Church's view that Perich's ministerial status and her unambiguously religious duties are significant, and emphasized the number of minutes spent in those duties. Pet. App. 20a-21a. The Se-

venth Circuit did just the opposite. It deferred to the Salvation Army's view that running its thrift shops is religious. It adopted a rebuttable presumption that employees with clerical titles are within the ministerial exception. It did not mention time allocations. 518 F.3d at 477-78; Pet. 14.

If this standard were applied here, the Church would win. More weight would be given to Perich's unambiguously religious duties; minutes on the clock would be irrelevant. Teaching the standard curriculum would be a religious duty because the Church requires teachers to "integrate faith into all subjects." Pet. App. 5a. And the Church would be entitled to "a presumption" that Perich is within the ministerial exception, absent evidence that her status as "commissioned minister" was a subterfuge. Two different standards, two different results.

The split is equally apparent in *Coulee Catholic Schools* v. *Labor and Industry Review Commission*, 768 N.W.2d 868 (Wis. 2009). Noting a split between "quantitative" and "functional" approaches to the ministerial exception, the court rejected the quantitative and chose the functional. *Id.* at 881-82. The court "envisage[d] a more limited role for courts in determining whether activities or positions are religious." *Id.* at 882. *Coulee* and this case have substantially similar facts, but different approaches and thus opposite results. Pet. 21-23.

These cases adopt deference, not abdication. The Church claims no right to arbitrarily designate just anyone as a minister. It asks only that secular courts not second-guess religious understandings of religious functions.

Nor has the en banc opinion in *Alcazar* v. *Corporation of the Catholic Archbishop* somehow ended the split. The court declined to choose "either the test created by the three-judge panel," "or one of the tests used by our sister circuits," 627 F.3d 1288, 1292 (9th Cir. 2010), thus acknowledging the split but not wading into it.

The second set of conflicts goes to whether a religious reason for a discharge increases the sensitivity of the litigation and whether courts can adjudicate claims that religious reasons are pretextual. Pet. 14-16, 18-19. Respondents have little to say about these conflicts.

According to the Sixth Circuit, a jury can decide "whether a doctrinal basis actually motivated Hosanna-Tabor's actions." Pet. App. 24a. But other circuits have held just the opposite. *Tomic* v. *Catholic Diocese*, 442 F.3d 1036, 1040 (7th Cir. 2006); Pet. 15. Respondents cannot reconcile *Tomic* with the decision below. They never even cite it.

The Second Circuit similarly rejected claims of pretext, holding that the nature of the claim is as important to the ministerial exception as the employee's duties. See *Rweyemamu* v. *Cote*, 520 F.3d 198, 208 (2d Cir. 2008); Pet. 16. Respondents argue that *Rweyemamu*'s statement was dictum, "because the *plaintiff* before" the court easily fell within the exception. Opp. 14 (emphasis added). Not so. *Rweyemamu* said that plaintiff's "*claim* easily falls within" the ministerial exception, and it rested this holding on two independent considerations: "the nature of Father Justinian's duties and *the basis for his dismissal*," 520 F.3d at 209 (emphasis added).

Perich argues that *her* pretext claim is different—either because the Synod's dispute-resolution policy does not apply (12 n.3), or the Church raised religious objections too late (23 n.13), or her evidence is so strong that she "does not need to establish pretext" (23). But these arguments go to the strength of her pretext claim, not to the circuit split.

They are also wrong. The dispute-resolution policy states that "[f]itness for ministry and other theological matters must be determined within the church." Pet. App. 77a. Rescinding a commissioned minister's call is a decision about "fitness for ministry." The language Perich quotes (12 n.3) is from an exception to an exception, Pet. App. 80a, and irrelevant here.

Nor did the Church raise its religious concerns too late. From the outset, it stated that Perich's conduct "demonstrates your total lack of concern for the ministry of Hosanna-Tabor Lutheran School" and showed that she was unable "to perform the functions of the sacred office." Record Entries 22-4, 22-5 (Letters to Perich 2/22/05, 3/19/05). And both courts below thought Perich's claim would require her to prove pretext. Pet. App. 24a-25a, 50a. Thus, her claim would fail in the Second and Seventh Circuits.

Respondents also claim that there is no split with respect to teachers in religious schools. Opp. 17 & n.4. But of the eight cases they cite, five decided no issue under the ministerial exception.[1] An overlap-

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[1] *Elvig* v. *Calvin Presbyterian Church*, 397 F.3d 790, 797 (9th Cir. 2005) (Kozinski, J., concurring in denial of rehearing en banc) (one-sentence hypothetical); *Geary* v. *Visitation School*, 7 F.3d 324, 326-29 (3d Cir. 1993) (entanglement claim under *Catholic Bishop*); *DeArment* v. *Harvey*, 932 F.2d 721, 722 n.3

ping set of five involved teachers who were not shown to teach religion or lead worship.[2] In the remaining case, the court viewed a math teacher's few religious duties as "easily isolated and defined."[3] Another overlapping set of three cases involved only pay claims, with no dispute about reinstatement.[4]

The relevant cases are those in which a teacher teaches "secular" classes *and* teaches religion classes and leads students in prayer and worship. As Judge White pointed out, there were four such cases before this one, and they were split: Two district courts ruled for the employee, and two appellate courts ruled for the church. Pet. App. 28a-29a; *Coulee*, 768 N.W.2d 868; *Clapper* v. *Chesapeake Conference*, 166 F.3d 1208 (4th Cir. 1998). In short, every factually similar *appellate* decision contradicts the decision below.

Respondents cannot distinguish *Coulee* or *Clapper*. Pet. 20-23. They say the teacher in *Coulee*

(8th Cir. 1991) ("ministerial exemption" at issue based on regulation, not Constitution) *Dole* v. *Shenandoah Baptist Church*, 899 F.2d 1389, 1396 (4th Cir. 1990) (same); *Ritter* v. *Mount St. Mary's College*, 814 F.2d 986 (4th Cir. 1987) (collateral estoppel).

[2] *EEOC* v. *Mississippi College*, 626 F.2d 477, 479, 485 (5th Cir. 1980) (psychology professor); *EEOC* v. *Fremont Christian School*, 781 F.2d 1362, 1369-70 (9th Cir. 1986) (no description of duties); *Geary*, 7 F.3d at 326 (same); *Dole*, 899 F.2d at 1391-92, 1396-97 (no indication whether teachers taught religion or led worship); *Ritter*, 814 F.2d at 988 (education professor).

[3] *DeMarco* v. *Holy Cross High School*, 4 F.3d 166, 168, 172 (2d Cir. 1993).

[4] *DeArment*, 932 F.2d at 721; *Dole*, 899 F.2d at 1391; *Fremont Christian*, 781 F.2d at 1364.

"'made efforts to integrate Catholicism into all her subjects,'" but "Perich did not do so." Opp. 20. This fails on two grounds. First, Perich's testimony that she generally failed to perform as instructed, if true, shows that she was a bad employee. It does not show what her assigned job duties were. Second, the teacher in *Coulee* gave similar testimony. See 768 N.W.2d at 897, 901 (Crooks, J., dissenting).

Respondents claim that *Coulee* was decided under the state constitution, Opp. 20 n.5, but this is mistaken. After reviewing both the state and federal constitutions, the Wisconsin court explicitly proceeded under the federal: "we proceed under the functional analysis of the ministerial exception as outlined in the First Amendment discussion above." 768 N.W.2d at 888. After twice stating that the state constitution "provides at least the protections" contained in federal law, *id.* at 887, 888, the court concluded that resolution of plaintiff's claims would violate both constitutions. *Id.* at 892. The state law holding unambiguously rested on the federal law holding.

As for *Clapper*, Respondents claim there is no evidence here that the Church "relied on its teachers 'to indoctrinate its faithful into its theology.'" Opp. 18 (quoting Pet. App. 22a). This conclusory statement is simply inconsistent with the record. With respect to the children in the school, the teachers are the *only* employees who teach religion and lead prayers, devotionals, and worship services. There are no other "ministers" or specialized religion teachers to do the "indoctrinating."

Respondents also say that *Clapper* is unpublished and inconsistent with published decisions in the

Fourth Circuit. Opp. 18-19. These published decisions are distinguished *supra* nn.1-2, 4. And this Court has repeatedly counted unpublished decisions in assessing circuit splits. *E.g.*, *Hall Street Associates* v. *Mattel*, 552 U.S. 576, 583 n.5 (2008); *Carter* v. *United States*, 530 U.S. 255, 260 (2000).

Finally, Respondents state—nineteen times—that the Church hires "even non-Lutheran[s]" to do the same work as Perich. Opp. 2 (twice), 4, 8, 9, 12, 18; Perich Opp. i, 3 (four times), 11, 12 (twice), 14, 21 (twice), 22. Like the court below, Pet. App. 21a, Respondents think this shows indifference to the religious beliefs of teachers. But no such inference is supported by the record. Were the Court to draw a non-record inference, it would be far more reasonable to infer that any non-Lutheran teacher is a faithful adherent of some other conservative Protestant church. (The record does not say, but in fact, she was a member of the Assemblies of God.)

Note too that *Coulee* held it irrelevant that teachers were not required to be Catholic; what mattered was that they were required to teach Catholicism. 768 N.W.2d at 891. This is another conflict.

The "non-Lutheran" was also a lay teacher. Pet. App. 5a; Record Entry 34-3 ¶¶ 12-13, 17 (Perich Affidavit). Lay teachers may perform the same duties—one year at a time—but lay teachers and called teachers have fundamentally different relationships with the Church. Called teachers must have college-level theology training, are subject to the same rules as pastors, and have tenure. Pet. App. 3a.

The cases conflict with respect to the boundaries of the ministerial exception generally *and* with respect to teachers in religious schools specifically.

II. There is a conflict with this Court's cases.

This Court has repeatedly prohibited civil courts from interfering with the selection of religious leaders. Pet. 26-29. Respondents attempt to distinguish these cases as involving "essentially ecclesiastical disputes," Opp. 20-21, but that begs the question. Cases within the ministerial exception *are* ecclesiastical disputes. The question is how to determine the boundaries of the ministerial exception.

Nor is it dispositive that Perich was a "teacher at a religious school" instead of a bishop or chaplain. Opp. 21. This Court extended the relevant First Amendment principles to religious school teachers in *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979), and the *Lemon*-era funding cases, Pet. 27-29. If courts cannot require religious schools to bargain with their lay teachers, and if the state cannot monitor these teachers or directly supplement their salaries, even in secular classes, surely courts cannot force schools to reinstate a commissioned minister to teach religion classes and lead devotionals.

The decision below also conflicts with cases prohibiting secular courts from deciding religious questions. Pet. 29-30. Respondents selectively quote *Ohio Civil Rights Commission* v. *Dayton Christian Schools*, 477 U.S. 619 (1986), to suggest that courts can review religious reasons for a discharge. Opp. 21. But the constitutional defense was not before the Court in *Dayton Christian*. The Court held only that "the District Court should have abstained from

adjudicating this case under *Younger* v. *Harris*," and that the school would have "an adequate opportunity to raise its constitutional claims" in the state proceedings. *Id.* at 625, 628.

Finally, the decision below conflicts with this Court's expressive-association cases. Pet. 31-32. Citing the *Roberts* trilogy, Respondents argue that "prohibiting discrimination is 'a state interest[] of the highest order that generally outweighs *any* burden on the freedom of association." Opp. 22 (emphasis added). This sweeping assertion is as startling as it is wrong. *Roberts* and its progeny all involved large organizations with substantially commercial characters whose message was not materially affected by the admission of women. See *Boy Scouts* v. *Dale*, 530 U.S. 640, 657-59 (2000) (distinguishing these cases). The analysis is different for non-commercial associations with a clear message.

Respondents try to distinguish *Dale* and similar cases, stating that the right of association "protects a right to discrimination where the discrimination itself is integral to the expressive activity." Opp. 22 n.8. But that is not what those cases say. Rather, the right of association protects against "forced inclusion" where the unwanted person "affects in a significant way the group's ability" to communicate its message. 530 U.S. at 648. Here, called teachers are the primary means by which the Church communicates religion to students. Forced retention of a religion teacher deemed unfit undoubtedly "affects in a significant way" the Church's control of its religious message to the children.

III. There has been no waiver.

Respondents say the Church waived any challenge to the primary-duties test because it "did not question the validity of that test before the court of appeals issued its decision." Opp. 23. This argument fails for two reasons. First, it conflates an argument with a claim. "Once a federal *claim* is properly presented, a party can make *any argument* in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992) (emphasis added). The Church's *claim* is that the suit is barred by the ministerial exception.

Second, even the Church's *arguments* haven't changed. The Church argued below that there was no need to apply the primary duties test because "the fact that Perich was a 'commissioned minister' * * * *in and of itself* should have been sufficient to satisfy the * * * ministerial exception." Pet. Ct. App. Br. 23 (emphasis added). It also objected to using "a 'quantitative' assessment" of Perich's duties, *ibid.* and argued that Perich's claim of pretext would impermissibly "require a court to weigh in on issues of [Church] doctrine and practice." *Id.* at 33-34 (quoting *Schleicher*). It did all this even though the panel was bound to apply the primary-duties test. Pet. App. 16a. The Church repudiated that test outright at its first actual opportunity, in its en banc petition.

Alternatively, Respondents say the Church should have raised a statutory defense under the Religious Freedom Restoration Act (RFRA) and avoided the need to decide any constitutional question. Opp. 24-25. But the Church has no obligation to raise every possible non-constitutional ground before

it raises any constitutional ground. This Court can "take the case as it comes," *United States* v. *Leon*, 468 U.S. 897, 905 (1984), deciding a constitutional defense even if a non-constitutional defense could have been raised but was not, *Brown* v. *Hotel and Restaurant Employees*, 468 U.S. 491, 500 n.9 (1984). Just as plaintiff is "master of the complaint," *Holmes Group, Inc.* v. *Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 831 (2002), so defendant is master of the answer.

The constitutional defense would have to be decided in any event. Because RFRA applies only to "Federal law," 42 U.S.C. § 2000bb-3(a), it is no defense to Perich's *state law* retaliation claim. See Pet. App. 72a-73a. The Sixth Circuit treats the ministerial exception as jurisdictional, *id.* 10a-11a, so it would have to be decided first. And the Sixth Circuit has held (in our view incorrectly) that RFRA "does not apply in suits between private parties." *General Conference Corporation of Seventh-day Adventists* v. *McGill*, 617 F.3d 402, 410-11 (6th Cir. 2010). Assuming that the EEOC's claims were barred by RFRA, Perich's claims were not.

CONCLUSION

For the foregoing reasons and those stated in the Petition, certiorari should be granted.

Respectfully submitted.

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AMICUS CURIAE BRIEF

NOV 24 2010

No. 10-553

IN THE

Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND CHERYL PERICH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* CHRISTIAN REFORMED CHURCH IN NORTH AMERICA, THE COUNCIL FOR CHRISTIAN COLLEGES AND UNIVERSITIES, CALVIN COLLEGE, AND KUYPER COLLEGE IN SUPPORT OF PETITIONERS

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No. 10-553

IN THE

Supreme Court of the United States

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Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND CHERYL PERICH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MOTION OF CHRISTIAN REFORMED CHURCH IN NORTH AMERICA, THE COUNCIL FOR CHRISTIAN COLLEGES AND UNIVERSITIES, CALVIN COLLEGE, AND KUYPER COLLEGE FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Amici curiae Christian Reformed Church in North America, the Council for Christian Colleges and Universities, Calvin College, and Kuyper College respectfully request leave of this Court to file the following brief in the above-captioned matter. In support of this motion, *amici curiae* state as follows:

Petitioner and one of the Respondents (the Equal Employment Opportunity Commission) have granted their consent to the filing of this brief. Consent letters for each of these parties are on file with the

Court. Counsel for Respondent Cheryl Perich, however, informed *amici* on November 23 that she would deny consent to the filing of the following brief, thus necessitating the Court's consideration of this motion.

The Christian Reformed Church in North America (the "CRC") is a denomination of just over 1,000 congregations in the United States and Canada. The CRC includes more than 230 congregations in the states composing the Sixth Circuit. The CRC is committed to Christian schools as the social agent that can make Christian education effective in the totality of life. Although the CRC does not itself operate Christian schools, it encourages its member churches to support Christian schools so that the churches' children can be educated in a way that acknowledges the lordship of Jesus Christ in all subject areas.

The Council for Christian Colleges and Universities ("CCCU") is an international association of intentionally Christian colleges and universities. Headquartered in Washington, D.C., the CCCU has 111 members and 37 affiliates in North America, including 22 colleges and universities in the Sixth Circuit. The CCCU exists to advance the cause of Christ-centered higher education and to help member institutions transform lives by faithfully relating all areas of scholarship and service to biblical truth.

Calvin College is an educational institution of the CRC. Located in Grand Rapids, Michigan, Calvin is one of the largest Christian colleges in North America with over 4,000 students and more than 100 academic programs. Calvin focuses on teaching, learning, and scholarship before the face of God. Calvin's curriculum and co-curriculum intentionally

emphasize the knowledge, skills, and virtues that students will need as they respond fully to the call of God in all areas of life.

Kuyper College is a ministry-focused, Christian leadership college that educates Christian leaders for ministry and service. Also located in Grand Rapids, Michigan, Kuyper provides students with the opportunity to see, understand, and live all of life through the lens of the Bible. Kuyper's curriculum is intended to awaken students to the need for possessing a solid, biblical worldview that gives every academic discipline significance as a tool for evangelism and discipleship, and for bringing social justice in Jesus' name.

As religious organizations devoted to incorporating their Christian faith into all of their activities, each of the *amici* will be able to "bring[] to the attention of the Court relevant matter not already brought to its attention by the parties" that will be "of considerable help to the Court. Rule 37.1.

For these reasons, the motion for leave to file the attached *amici curiae* brief should be granted.

Respectfully submitted.

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November 26, 2010

QUESTION PRESENTED

Based on this Court's First Amendment jurisprudence, the federal circuit courts have developed the ministerial exception, which bars most employment-related lawsuits brought against religious institutions by employees who play an important religious role. But the circuits are badly split as to the proper application of this doctrine to employees serving in roles other than as a pastor, priest, or rabbi. The Third, Fourth, Sixth, and D.C. Circuits have adopted a "primary duties" test. *Petruska* v. *Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006); *Rayburn* v. *Gen Conf. of Seventh-day Adventists*, 772 F.2d 1164 (4th Cir. 1985); Pet. App. 16a–17a; *EEOC* v. *Catholic Univ.*, 83 F.3d 455 (D.C. Cir. 1996). The Second, Fifth, Seventh, and Ninth Circuits examine the totality of an employee's job duties and the nature of the underlying employment dispute. *Rweyemanu* v. *Cote*, 520 F.3d 198 (2d Cir. 2008); *Starkman* v. *Evans*, 198 F.3d 173 (5th Cir. 1999); *Schleicher* v. *Salvation Army*, 518 F.3d 472 (7th Cir. 2008); *Alcazar* v. *Corp. of the Catholic Archbishop*, 598 F.3d 668 (9th Cir. 2010). And the First, Eighth, Tenth, and Eleventh Circuits resolve ministerial-exception claims on a case-by-case basis. *Natal* v. *Christian & Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989); *Scharon* v. *St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360 (8th Cir. 1991); *Skrzypczak* v. *Roman Catholic Diocese*, 611 F.3d 1238 (10th Cir. 2010); *Gellington* v. *Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299 (11th Cir. 2000). The question presented is:

What is the proper test to apply when determining whether an employee of a religious institution is a "ministerial" employee?

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BRIEF OF CHRISTIAN REFORMED CHURCH IN NORTH AMERICA, THE COUNCIL FOR CHRISTIAN COLLEGES AND UNIVERSITIES, CALVIN COLLEGE, AND KUYPER COLLEGE AS *AMICI CURIAE* SUPPORTING PETITIONERS

The above *amici curiae* respectfully submit that the petition for a writ of certiorari should be granted.[1]

INTEREST OF *AMICI CURIAE*

Proposed *amici curiae* are religious organizations that conduct both distinctly religious activities (such as the study of the Bible, prayer, training in theology, and worship services) and a wide range of educational and other activities that serve social needs as an exercise of religious conviction. These institutions (and those other religious institutions that the *amici* represent) all exist to provide training in a Christian worldview across all subject matters.

Like many other religious organizations, proposed *amici* are guided by their beliefs to carry out their activities. Proposed *amici* are committed to applying Christian doctrine and belief to all areas of human endeavor. The Sixth Circuit's decision in this case has significant implications for religious employment decisions by these proposed *amici*. Specifically, these institutions reject the sacred/secular distinction adopted by the Sixth Circuit as contrary to

[1] Pursuant to this Court's Rule 37.6, *amici curiae* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the *amici*, their counsel, and their members made a monetary contribution to the preparation or submission of this brief.

their core religious beliefs. The Sixth Circuit's decision thus requires courts to impose their own view as to whether a religious institution's employee's duties are "religious." Such questions are the very type of entanglement with religion that the ministerial exception was created to avoid.

The interests of the proposed *amici*, and their religious mission and character, are set forth in the accompanying motion for leave to file a brief as *amici curiae*.

STATEMENT

The ministerial exception flows from both of the First Amendment's Religion Clauses and preserves the right of religious institutions to make hiring decisions free from government interference when those decisions concern employees who play an important religious role in the institution. In this case, the Sixth Circuit decided that a teacher employed by a church-operated school did not fall within the ministerial exception even though the teacher's job description consisted entirely of spiritual duties: her job description obligated her "[t]o exemplify the Christian faith and life," "to lead others towards Christian maturity," to promote "Christian education," "[t]o exemplify Christian discipleship and witness," and "[t]o teach faithfully the Word of God." The church tasked her with fulfilling these religious duties by serving as a third- and fourth-grade teacher in the church's school. In her role as a teacher, she was to teach a religion class four days a week, lead her class in prayer three times a day, lead the students in devotions each morning for five to ten minutes, and "integrate faith in all subjects," including the math, English, reading, science, and music classes she taught. Like the school in this case, the

amici employ numerous instructors with similar religious and spiritual duties.

Even though this Court has expressly recognized that the very reason church-operated schools exist is for "the propagation of a religious faith," *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 503 (1979), the Sixth Circuit concluded that the teacher's "primary" duties were secular. It reached this conclusion not because of anything in her job description, but because she spent "approximately six hours and fifteen minutes of her seven hour day teaching" what the Sixth Circuit decided were "secular subjects," and only 45 minutes on what the Sixth Circuit deemed to be religious subjects. *EEOC* v. *Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 772, 780 (6th Cir. 2010). The Sixth Circuit construed the teacher's admission that she could "only recall two instances in her career when she introduced religion into secular subjects," *id.* at 773, as demonstrating that the school did not intend her to engage in religious activity, rather than an independent reason that would support her termination.

This result directly conflicts with a decision of the Fourth Circuit, *Clapper* v. *Chesapeake Conference of Seventh-Day Adventists*, 166 F.3d 1208, 1998 WL 904528 (4th Cir. 1998), which held that a similarly situated teacher fell squarely within the scope of the ministerial exception. What is more, the Sixth Circuit's formulaic approach disregards important First Amendment principles. The implications of the Sixth Circuit's decision extend far beyond the religious-school setting to implicate employment decisions made by religious organizations throughout the Sixth Circuit. *Amici curiae* respectfully request that the Court grant the petition for a writ of certiorari,

reject the primary-duty analysis adopted by the Sixth Circuit, and instead adopt a standard for the ministerial exception that focuses on the employee's role in the religious organization.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's decision undermines First Amendment principles recognized by this Court and conflicts with the decisions of other courts including, most notably, the Fourth Circuit.

The ministerial exception arises from the interplay of employment laws and the First Amendment to prevent courts from trammeling on religious organizations' constitutional rights of free exercise of religion and to avoid excessive judicial entanglement in religious decisions. To determine whether the ministerial exception applies, courts first determine whether the organization is religious and then consider whether the employee's position is "ministerial." Only the second issue is contested here.

The ministerial exception applies not just to ordained ministers but also to certain other employees of religious institutions. *Hollins* v. *Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007). In *Hollins*, the Sixth Circuit reasoned that the "function of the plaintiff's employment position" is dispositive. *Id.* (citing *Rayburn* v. *Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985)). Specifically, if the function of the position is to teach, spread the faith, govern the church, supervise a religious order, or supervise or participate in worship and religious rituals, the position is ministerial. *Id.* Accordingly, courts have found that directors of music, communications directors, and religious-school teachers can all be ministerial positions. *EEOC* v.

Roman Catholic Diocese of Raleigh, N.C., 213 F.3d 795 (4th Cir. 2000); *Alicea-Hernandez* v. *Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003); *Clapper*, 166 F.3d 1208.

The application of the ministerial exception to teachers in religious organizations is especially appropriate. As this Court has emphasized, teachers play a "critical and unique role . . . in fulfilling the mission of a church-operated school." *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979). Because of "the admitted and obvious fact that the *raison d'etre* of parochial schools is the propagation of a religious faith," *id.* at 503 (quotations omitted), "[r]eligious authority" in a church-operated school "necessarily pervades the school system," such that even when teaching "secular subjects," a teacher may "intertwine[]" "religious doctrine" with "secular instruction." *Id.* at 501 (emphasis and quotations removed). This is one of the reasons why some parents choose to incur the expense of sending students to private religious schools, rather than sending them to public schools. Based on this recognition that teachers at religious schools may "involv[e] some aspect of faith or morals in secular subjects," *id.*, this Court decided in *NLRB* that allowing the National Labor Relations Board to "exercise jurisdiction over teachers in church-operated schools" would inescapably raise "serious First Amendment questions." *Id.* at 504. In short, a teacher or professor is "an important instrument in a faith-based organization's efforts to pass on its faith to the next generation." *Coulee Catholic Schs.* v. *Labor & Indus. Review Comm'n*, 768 N.W.2d 868, 890 (Wis. 2009).

The primary-duty analysis the Sixth Circuit adopts here creates the very problem of excessive en-

tanglement that the ministerial exception is intended to avoid.

A. The primary-duties test does not sufficiently protect First Amendment freedoms.

The circuit courts have developed the ministerial exception based on "a long line of Supreme Court cases that affirm the right of churches to 'decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *EEOC* v. *Catholic Univ. of Am.*, 83 F.3d 455, 462 (D.C. Cir. 1996) (quoting *Kedroff* v. *St. Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)). The doctrine prevents courts from considering "claims involving the employment relationship between a religious institution and its ministerial employees." *Hollins*, 474 F.3d at 225.

The doctrine effectuates both of the Religion Clauses of the First Amendment. *Tomic* v. *Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006). It protects free exercise because, "like an individual, a church in its collective capacity must be free to express religious beliefs, profess matters of faith, and communicate its religious message," and therefore "the church as an institution must retain the corollary right to select its voice." *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 306 (3d Cir. 2006). "Accordingly, the process of selecting a minister"—or of deciding to fire one—"is per se a religious exercise." *Id.*

The ministerial-exception doctrine advances the Establishment Clause by preventing "a constitutionally impermissible entanglement with religion if the church's freedom to choose its ministers is at stake."

Alcazar v. *Catholic Archbishop of Seattle*, 598 F.3d 668, 672 (9th Cir. 2010). Indeed, the Establishment Clause broadly bars inquiry into the employment decisions of churches and other religious institutions because "[e]ntanglement has substantive and procedural components": "'It is not only the conclusions that may be reached by [the court] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.'" *Id.* at 672–73 (quoting *NLRB*, 440 U.S. at 502). As Judge Posner has explained, "[I]n investigating employment discrimination claims by ministers against their church, secular authorities would necessarily intrude into church governance in a manner that would be inherently coercive, even if the alleged discrimination were purely nondoctrinal." *Tomic*, 442 F.3d at 1039. Consequently, the courts' analytical focus when applying the doctrine is on whether the action taken involves a ministerial position, not on the reasons for the decision. *Roman Catholic Diocese of Raleigh*, 213 F.3d at 801 ("The exception precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decision. The church need not, for example, proffer any religious justification for its decision."); *Catholic Univ. of Am.*, 83 F.3d at 465 ("The focus under the ministerial exception is on the action taken, not possible motives . . . .").

The Sixth Circuit applied the "primary duties" test, which considers an employee to be a minister "if 'the employee's primary duties consist of *teaching*, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship.'" *Hosanna-Tabor*, 597 F.3d at 778 (emphasis added). To assess the position's primary duties, courts consider the mix of sa-

cred and secular duties. See *id.* at 779–80. But courts attempting to characterize duties as sacred or secular results in the very entanglement with religion that the ministerial-exception doctrine was adopted to avoid. See *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 336 (1987) (recognizing that the line between religious and secular activities "is hardly a bright one"); *Alcazar*, 598 F.3d at 675.

The premise that a religious teacher is acting in a non-religious manner when teaching a secular subject, such as math or English, ignores the very reason a religious school exists. See *NLRB*, 440 U.S. at 503 ("[T]he *raison d'etre* of parochial schools is the propagation of religious faith."); see also *Coulee Catholic Schs.*, 768 N.W.2d at 882 (stating that it "minimize[s]" religion to "call[] a faith-centered social studies class, for example, 'secular' because it does not involve worship and prayer"); *Amos*, 483 U.S. at 336 ("an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission"). Moreover, the "prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." *New York* v. *Cathedral Acad.*, 434 U.S. 125, 133 (1977); see also *Clapper*, 166 F.3d at *2 (giving examples of incorporating faith into "secular" classes, including "teaching of the influence of religion on the events of history in social studies classes"). Many religious schools or universities expect teachers and professors to approach all of their subjects from a religious perspective. See, e.g., http://www.calvin.edu/about/mission.htm ("[Calvin College] offer[s] education that is shaped by Christian faith, thought, and prac-

tice."). For example, *amici* believe and teach that God's orderly nature is reflected in the scientific process (and indeed provides the very basis for the scientific method), that there are norms established by God for all areas of human endeavor including such purportedly secular subjects as English and arithmetic, and that all activities are to be done for the glory of God. Accordingly, the very process of making distinctions between what is "sacred" and what is "secular" in the context of a religious educational institution requires courts to inquire into the school's curriculum (to determine exactly what is taught in each class) and to divine what is and what is not religious.

Amici recognize that application of the ministerial exception requires some distinctions between religious and non-religious activity, but the primary-duties test involves more entanglement with religion than necessary. Instead, ***amici curiae*** believe the Court should adopt a less-intrusive test for whether a position is ministerial, and hold that "if a person (1) is employed by a religious institution, (2) was chosen for the position based largely on religious criteria, and (3) performs some religious duties and responsibilities, that person is a 'minister' for purposes of the ministerial exception." *Alcazar*, 598 F.3d at 676 (internal quotations omitted); *Starkman* v. *Evans*, 198 F.3d 173, 176 (5th Cir. 1999). This test provides far less entanglement than the primary-duties analysis adopted by the Sixth Circuit.

B. Even if the Court adopts the primary-duties test, the Court should reject the Sixth Circuit's quantitative analysis.

The Sixth Circuit's decision here demonstrates the fundamental flaw in applying the primary-duties

analysis in a quantitative as opposed to qualitative manner. The point of this test is to determine "'whether a position is important to the spiritual and pastoral mission of the church.'" *Rayburn*, 772 F.2d at 1169; accord *Catholic Univ. of Am.*, 83 F.3d at 461. But the quantitative approach adopted by the Sixth Circuit does far less—it assumes importance is shown by time spent on particular tasks.

This assumption bears little connection with reality, even in a secular context. Under this approach, one would conclude that the primary duty of a soldier is to train for war, not to fight in war, given that soldiers typically spend far more time training than they do in actual combat. But see http://www.army.mil/info/organization/ ("The Army's mission is to fight and win our Nation's wars."). And in the religious context, it makes even less sense. As the Wisconsin Supreme Court recently explained when "reject[ing] a primary duties test that looks to see . . . whether a majority of the employee's time is spent on quintessentially religious tasks," "[t]his narrow view does not, in our view, sufficiently respect the constitutional imperatives of the free exercise of religion." *Coulee Catholic Schs.*, 768 N.W.2d at 882. Properly weighing the importance of the teacher's function in fulfilling the church's mission, in contrast, "gets to the real heart of the ministerial exception, which is preventing the state from intruding into the mission of religious organizations or houses of worship." *Id.* at 884.

Furthermore, applying this hours-based approach outside the teaching context would be no better. That approach would mean that a pastor whose sole function was to run a charity such as a church's homeless shelter, a task that could be described as

secular, would not satisfy the "primary duties" test. The Ninth Circuit has criticized the "primary duties" test for just this reason: "[T]he underlying premise of the primary duties test—that a minister must 'primarily' perform religious duties—is suspect. A religious organization can constitutionally require its ministers or ministers-in-training to spend a year volunteering in urban areas in the United States." *Alcazar*, 598 F.3d at 675.

The Sixth Circuit's adoption of this quantitative approach creates a conflict with decisions of other courts, as noted in Hosanna-Tabor's petition.[2] Had this case arisen in the Fourth Circuit or in the Michigan state courts, it would have reached a different outcome. In *Clapper*, the Fourth Circuit applied the ministerial exception to conclude the federal courts did not have jurisdiction to address the employment-related claims of a former teacher at a school operated by the Seventh-Day Adventist Church. 1998 WL 904528. Before he was terminated, the teacher had "on a daily basis . . . taught Bible," "led his students in prayer" at least three times a day, "conducted worship each day with his students for approximately ten minutes," and incorporated theology into the traditional academic cur-

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[2] Another petition filed the same day as Hosanna-Tabor's further highlights the need for this Court to clarify the extent to which the First Amendment's protections prevent the state from interfering with the internal decisions of religious organizations. See Pet. for Writ of Cert., *Cooke* v. *Tubra* (No. 10-559) (presenting the question whether a pastor's defamation claim, arising from the church's decision to explain to its congregation why it fired him, is barred by the First Amendment).

riculum. *Id.* at *4. Although the terminated teacher "attempt[ed] to downplay the ministerial nature of his former teaching positions . . . by asserting that the time he spent instructing his students in Bible and leading them in worship constituted only 10.6 percent of his work week," *id.*, the Fourth Circuit reasoned that "[t]he primary duties test 'necessarily requires a court to determine whether a position is important to the spiritual and pastoral mission of the church.'" *Id.* at *6. Noting "the primary purpose of Seventh-day Adventist elementary education is the redemption of each student's soul" and that the Seventh-Day Adventist Church relies heavily upon its full-time, elementary school teachers to carry out its sectarian purpose," the Fourth Circuit concluded that "the primary duties of full-time teachers at elementary schools operated by the [church's conference] consist of teaching and spreading the Seventh-day Adventist faith and supervising and participating in religious ritual and worship." *Id.* at 7. In short, when faced with facts nearly identical to this case (indeed, even the percentage of time is equivalent: the plaintiff-teacher here spent 10.7 percent of her day on religious subjects), the Fourth Circuit did not measure the importance of the teacher's duties by quantifying the hours he spent on certain tasks, but by examining the importance of his role in carrying out the school's religious purpose.

Similarly, this case would likely have reached the opposite result had Ms. Perich pursued her claims in state court. The Michigan Court of Appeals recently held that a teacher at a Catholic elementary school fell within the scope of the primary-duties test despite her argument that a majority of the classes she taught were in arithmetic, and that she spent a minority of her work time teaching religion.

Weishuhn v. *Catholic Diocese of Lansing*, 287 N.W. 2d 211 (Mich. Ct. App. 2010). Her "argument [was] based on the premise that teaching mathematics is secular," but the court correctly recognized that "teaching 'secular' classes is not necessarily 'purely secular' in the context of religious schools." *Id.* at 218. Looking at all of the circumstances of her employment, the court concluded her duties were "primarily religious." *Id.* The Michigan court (like the Fourth Circuit) applied a qualitative, not quantitative, analysis of whether the ministerial exception applied.

Reaching the opposite conclusion as the Fourth Circuit and the Michigan Court of Appeals, the Sixth Circuit's decision here deprives religious institutions in the Sixth Circuit of specific protections arising from both the Free Exercise and the Establishment Clauses. Under the Sixth Circuit's ruling, courts in the Sixth Circuit may insert themselves into the religious employment decisions of churches, Jewish schools, Protestant universities, Muslim charities, and Catholic hospitals to review those decisions if the employee spends at least 51% of his time on what the court considers to be "secular" activities (such as teaching a math class or running a homeless shelter). Even though these organizations exist to carry out a religious mission and even if the church wrote the employee's job description to state that her primary duty is, as here, to "teach the Word of God," a court in the Sixth Circuit can conclude that the employee does not fall within the ministerial exception created by the First Amendment. Substituting its secular judgment for the religious organization's view of the employee's role, the court can then apply laws like the ADA and Michigan's Persons With Dis-

abilities Civil Rights Act to dictate to the church who it must employ in carrying out its spiritual mission.

Accordingly, even if the Court does not reject the primary-duty analysis outright, *amici* urge the Court to reject the Sixth Circuit's quantitative approach in favor of a qualitative approach that focuses on the importance of a position's "religious" duties to the overall mission of the religious organization.

CONCLUSION

In the end, it is the religious organization that must decide how to fulfill its spiritual mission, and to do that, it may define the duties of its employees. When it has done that, as here, courts are ill-equipped and without authority to second-guess those decisions, particularly by relying simply on the amount of time the employee spends on certain "secular" tasks and especially when the employer sees those tasks as spiritual, rather than secular. For these reasons, the *amici* respectfully request that this Court grant the school's petition for a writ of certiorari and then reverse the decision of the Sixth Circuit.

Respectfully submitted.

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November 26, 2010

AMICUS CURIAE BRIEF

No. 10-553

In the Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF *AMICI CURIAE* FOR INTERNATIONAL MISSION BOARD OF THE SOUTHERN BAPTIST CONVENTION, INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, COUNCIL OF HINDU TEMPLES OF NORTH AMERICA, UNION OF ORTHODOX JEWISH CONGREGATIONS OF NORTH AMERICA, NATIONAL COUNCIL OF YOUNG ISRAEL, UNITED SIKHS, AND LUTHERAN CHURCH–MISSOURI SYNOD IN SUPPORT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 37.2, the International Mission Board of the Southern Baptist Convention, International Society for Krishna Consciousness, Council of Hindu Temples of North America, Union of Orthodox Jewish Congregations of North America, National Council of Young Israel, UNITED SIKHS, and Lutheran Church–Missouri Synod respectfully move for leave to file the following *amicus* brief in support of the petition for certiorari.

The Acting Solicitor General, on behalf of Respondent Equal Employment Opportunity Commission, has consented to the filing of this brief. Petitioners too have consented. These consent letters are on file with the Court. *Amici* sought consent from Respondent Cheryl Perich on November 11, 2010. On November 23, however—more than ten days later—Ms. Perich's counsel informed *amici* that she neither opposes nor consents to the filing of the following brief, thus necessitating the Court's consideration of this motion.

The *International Mission Board of the Southern Baptist Convention* (IMB) is an entity of the Southern Baptist Convention, the nation's largest evangelical denomination with more than 40,000 churches and nearly 16 million members. To achieve its vision of seeing a multitude of every people, tribe, and tongue from around the world come to worship and exalt Jesus Christ as Lord and Savior, the IMB employs more than 5,000 Christian workers.

The *International Society for Krishna Consciousness* (ISKCON) is a monotheistic, or Vaishnava, tradition within the broad umbrella of Hindu culture

and faith. There are approximately 500 ISKCON temples worldwide, including 50 in the United States. As part of its tradition, ISKCON has affiliated parochial schools that teach secular topics as well as spiritual subjects and values. It is a core belief among ISKCON's members that religiously qualified teachers should teach in ISKCON's schools and should be appropriate role models in their belief, practice, and application of spiritual ethics. ISKCON has an interest in this case because it supports an interpretation of the ministerial exception that protects the autonomy of its temples and schools to implement their spiritual values.

The *Council of Hindu Temples of North America* is a voluntary association of Hindu Temples in North America. It is one of the largest Hindu umbrella bodies in North America, with a membership of over 100 Hindu Temples. The council advocates on behalf of Hindu Temples and Hindus in both the United States and Canada. The Council has an interest in this case because it supports an interpretation of the ministerial exception that recognizes the religious nature of Hindu Temple workers such as priests, *swamis*, monks, *paricharakaras* (religious food preparers), *sthapatis* (religious architects), and *shilpis* (religious artisans). Although these roles may be unfamiliar to the secular court system, they have been recognized by Hindus as religious for millennia, and are integral to the religious life of Hindu Temples.

The *Union of Orthodox Jewish Congregations of America* (UOJCA) is a non-profit organization representing nearly 1,000 Jewish congregations throughout the United States. Founded in 1898, it is the largest Orthodox Jewish umbrella organization in the nation. Through its Institute for Public Affairs, the

UOJCA advocates legal and public policy positions on behalf of the Orthodox Jewish community. The American Orthodox Jewish community has flourished in no small measure due to the constitutional freedoms that allow it to educate its children in Jewish "day schools." Such schools offer children a dual curriculum that combines standard secular studies with extensive in-depth study of Jewish religious texts and teachings. Many Jewish day schools strive to integrate study of the secular and the sacred, such that teachers in the English or science classroom are as much engaged in "Jewish education" as those teaching Bible and Talmud. The schools' ability to recruit and employ teachers capable of this type of teaching is essential to the educational enterprise, and thus critical to the welfare of the American Jewish community.

The *National Council of Young Israel* (Young Israel) is a Jewish religious organization that seeks to promote the religious observance of the families that attend the Jewish congregations that comprise its membership. Young Israel was established in 1912, a time when observance of Torah laws and customs required extraordinary sacrifice. Young Israel worked tirelessly then and continues to do so now to facilitate and enhance the Torah observance of its congregational constituents. Today, Young Israel's membership includes approximately 150 congregations (representing approximately 25,000 families), and it additionally represents hundreds of synagogues, Jewish day schools, and Jewish community institutions throughout the United States. Young Israel's principal objective is to foster and maintain a program of spiritual, cultural, social, and communal activity towards the advancement and perpetuation of tradi-

tional Torah-true Judaism. Young Israel joins this brief in support of protecting the autonomy of religious associations—a freedom that has permitted traditional Torah-true Judaism to flourish in this country.

UNITED SIKHS is an international, nonprofit, nonpartisan organization that has 11 chapters globally. UNITED SIKHS has four major thematic areas: (1) International Civil and Human Rights Advocacy; (2) Humanitarian Disaster Relief; (3) Education; and (4) Community Health Care. In defending religious freedom both domestically and internationally, UNITED SIKHS has seen the detrimental effects of government policies that restrict religious rights. UNITED SIKHS is thus compelled to voice its concern when it is witness to the government's encroachment on constitutional rights that safeguard a faith group's choice in selecting its religious leaders.

The *Lutheran Church–Missouri Synod* (the Synod) is a nonprofit religious corporation organized under the laws of the State of Missouri. With more than 6,000 member congregations and 2.3 million baptized members, it is the second-largest Lutheran denomination in North America. For generations the Synod, which places great importance on the Christian education of its children, has operated one of the largest Protestant religious school systems in the United States. Today, the Synod roster of commissioned ministers includes more than 10,000 teachers. The Synod has a profound interest in its First Amendment rights and in the preservation of the ministerial exception to safeguard against judicial intervention in the church's decisions regarding the hiring and termination of its ministers, including commissioned ministers serving as teachers.

The unique perspectives and arguments of the *amici*, as reflected above and as further set forth in the following brief, demonstrate that this brief will be "of considerable help to the Court" by "bring[ing] to the attention of the Court relevant matter not already brought to its attention by the parties." Rule 37.1.

For these reasons, this motion for leave to file the following brief should be granted.

Respectfully submitted.

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NOVEMBER 2010

QUESTION PRESENTED

Whether the ministerial exception applies to a teacher at a religious elementary school who teaches the full secular curriculum, but also teaches daily religion classes, is a commissioned minister, and regularly leads students in prayer and worship.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

Amici strongly believe that religious institutions must be able to choose their own leaders without undue government interference; that a robust "ministerial exception" is critical to safeguarding free exercise rights; and that the Sixth Circuit's decision to narrow that exception, deepening an acknowledged circuit split, requires this Court's attention.

For decades, the lower courts have recognized the risks inherent in regulating the relationship between a church—by which we mean religious organizations and houses of worship of all kinds—and its leaders. A church's freedom to choose its own leaders is essential to its ability to control its own voice. And a church's leaders—including teachers who serve pastoral and devotional roles in its religious schools—are the chief means by which it passes on the faith to the next generation. The ministerial exception thus safeguards religious freedom by requiring secular courts to abstain from certain employment disputes between religious institutions and their leaders. Those disputes are sensitive, complex, and often dependent on matters of religious doctrine. Courts must tread carefully.

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* Counsel for all parties received timely notice of the filing of this brief. Counsel for Petitioner and Respondent EEOC have consented to its filing, and their letters of consent are on file with the Clerk. Counsel for Respondent Cheryl Perich did not consent. In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici*, has made a monetary contribution to the preparation or submission of this brief.

The Sixth Circuit's approach does not. Joining three other circuits, the Sixth Circuit adopted a rigid and unduly narrow version of the ministerial exception—a version that has been directly rejected by four other circuits.[1] The Sixth Circuit's test requires courts to resolve church employment disputes unless a court decides that an employee's "primary duties" are religious. Pet. App. 16a. Under this approach, secular courts must decide which of a leader's duties are "religious" and whether those duties are "primary"—even where, as here, the employee in question was a religious school teacher who was required to be trained for the ministry, was selected by vote of the Church congregation, and served the Church as a "commissioned minister." *Id.* 4a-5a. Further, under the Sixth Circuit's approach, secular courts must resolve employment disputes that turn on matters of religious doctrine—even where, as here, resolution requires the court to determine whether the religious reason given for the employer's action is pretextual or truly reflective of Church teaching.

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[1] In addition to the Sixth Circuit, the Third, Fourth, and D.C. Circuits have adopted the "primary duties" test. See *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 304 n.6 (3d Cir. 2006); *Rayburn* v. *Gen. Conf. Of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985); *EEOC* v. *Catholic Univ.*, 83 F.3d 455, 463 (D.C. Cir. 1996). The Second, Fifth, Seventh, and Ninth Circuits have rejected it. See *Rweyemamu* v. *Cote*, 520 F.3d 198, 208 (2d Cir. 2008); *Alcazar* v. *Corp. of the Catholic Archbishop*, 598 F.3d 668, 675-76 (9th Cir. 2010) (pending reh'g en banc); *Starkman* v. *Evans*, 198 F.3d 173, 176-77 (5th Cir. 1999); *Schleicher* v. *Salvation Army*, 518 F.3d 472, 477-78 (7th Cir. 2008). The remaining circuits have taken a case-by-case approach, adopting no particular test.

Other circuits have crafted standards that avoid the pitfalls of entanglement while drawing sensible boundaries that exclude employees whose duties are clearly secular. The Ninth Circuit, for example, requires that an employee of a religious institution be "chosen for the position based largely on religious criteria" and "perform some religious duties." *Alcazar*, 598 F.3d at 676 (quotations omitted). This kind of rule strikes the appropriate balance between protecting employees and respecting the integrity of religious institutions and the leaders who run them.

Although *amici* represent a diverse array of religious faiths, they are united in their concern that the "primary duties" test will excessively entangle secular courts in the internal affairs of religious institutions and in the intricacies of religious doctrine. Here, the dispute turns on the Church's belief that disputes should be resolved internally—a belief common to many religious traditions. The potential for entanglement posed by the decision below is well-illustrated by the richness and complexity of those traditions on just this one matter of faith. By requiring a secular court to second-guess the Church's religious commitment to internal dispute resolution, the decision below requires entanglement.

Amici are also united in their practical concern over the uncertainty generated by the lower courts' decisions in this area. In the absence of clear guidance, religious institutions must make employment decisions about their most important leaders, unable to predict which of their duties a court will ultimately find important. And as this Court has recognized, the "[f]ear of potential liability" has an unfortunate chilling effect on "the way an organization carrie[s]

out * * * its religious mission." *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 336 (1987).

Amici, religious denominations and institutions who are described more fully in Appendix A, respectfully request that the Court grant the petition to address this uncertainty and to prevent undue entanglement of church and state.

STATEMENT OF THE CASE

This case is an employment dispute between Petitioner Hosanna-Tabor Evangelical Lutheran Church and School and one of its teachers, Respondent Cheryl Perich. The Church is an ecclesiastical corporation and a member congregation of The Lutheran Church–Missouri Synod. Its school is dedicated to providing a "Christ-centered education" based on biblical principles. Pet. App. 3a-5a.

As one of the school's "called teachers," Perich was required to complete training in Lutheran theology and to receive a declaration from a faculty committee that she was prepared for the ministry. *Id.* at 3a, 33a, 51a. Perich was appointed to her position by a vote of the Church's congregation, and she was issued a call by the Church to serve as a "commissioned minister." *Id.* at 3a-4a, 33a-34a. Unlike "non-called" teachers, who are hired by the School's Board of Education, Perich was (like all commissioned ministers) hired by the Church itself. She could not be fired without cause, and she was subject to the same dispute resolution procedures as the Church's pastor. *Id.* at 3a, 51a.

Perich taught the school's fourth-grade curriculum. Her obligations to her students and her employer included "integrat[ing] faith in all subjects," serving as a "Christian role model[]," teaching relig-

ion classes four days a week, leading her students in prayer and devotional exercises several times every school day, and attending chapel services with her students every week. *Id.* at 5a, 35a.

Just prior to the 2004-2005 school year, Perich became ill. With the school's support, she took leave to deal with her illness, but she subsequently insisted on returning to work in the middle of the school year. *Id.* at 7a, 37a. Concerned about Perich's ability to safely supervise students, and about disruption to the students who had grown accustomed to their replacement teacher, the school asked Perich to continue her leave while they developed a plan for her return. *Id.* at 6a-7a, 36a-37a. Perich refused and reported to work even though the school had no job for her. When the School's principal suggested to Perich that her conduct had jeopardized her continued employment, Perich threatened to sue. *Id.* at 8a, 38a.

Church teaching, however, provides that such disputes should be resolved within the Church rather than in civil court. Accordingly, the Church has adopted bylaws providing a detailed procedure for internal dispute resolution and appeals. See *id.* at 77a-104a. As a called teacher serving the Church as a commissioned minister, Perich had the right and the obligation to use these procedures. *Id.* at 51a.

Perich nevertheless chose to reject the obligation inherent in her call. Thus, citing her "insubordination and disruptive behavior," as well as her "threat[s] to take legal action," the school board recommended rescinding Perich's call. *Id.* at 38a, 9a. At the next meeting of the congregation, the Church members voted to do so. *Ibid.*

Following the Church's termination of her commission, Perich filed a charge with the Equal Employment Opportunity Commission (EEOC). The EEOC in turn filed a complaint against the Church, alleging a single count of retaliation (not discrimination) under the Americans With Disabilities Act. Perich intervened, seeking a court order requiring the Church to reinstate her as a commissioned minister.

In the district court, the Church maintained that the suit was barred by the ministerial exception. Forcing it to reinstate a called minister (or bear other liability), the Church explained, would violate its right to choose and discipline its own religious leaders. The district court agreed. Although it acknowledged that courts are "sharply divided" over the scope of the ministerial exception, the district court found that Perich "must be considered a ministerial employee." *Id.* at 50a. It was clear that "the school values [its called teachers] as ministerial even if some courts would not." *Id.* at 51a. The Church also explained that Perich's threats of litigation violated Church teachings regarding the need to resolve disputes internally. As the district court recognized, applying the ministerial exception enabled the court to avoid scrutiny and "exploration of religious doctrine." *Id.* at 50a; see also *id.* at 50a-52a.

The Sixth Circuit reversed. Although it acknowledged that other circuits disagreed with its approach, the court chose to "look to the function, or 'primary duties' of the employee," and to apply the ministerial exception if the employee's primary duties are religious in nature. *Id.* at 16a. Even though Perich was a commissioned minister, the court "look[ed] at the function of the plaintiff's employment position," rather than her status as a minister, to determine

whether her position was "important to the spiritual and pastoral mission of the church." *Id.* at 17a (quotation omitted). In the court of appeals' view, Perich's role—as a minister teaching the Church's children—was not sufficiently important.

The court of appeals further concluded that going forward with this case "would not require the court to analyze any church doctrine." *Id.* at 24a. The court reasoned that church policies "clearly contemplate that teachers are protected by employment discrimination and contract laws." *Ibid.* The court did not explain how those laws are to be reconciled with the Church's explicitly faith-based requirement for internal dispute resolution.

Judge White separately concurred to emphasize that the courts of appeals remain "evenly split" on the scope of the ministerial exception. *Id.* at 26a. As she observed, "several courts have recognized the lack of uniformity in this area." *Id.* at 26a n.2.

REASONS FOR GRANTING THE PETITION

The lower courts are deeply split over the proper scope of the ministerial exception. Moreover, the test that the Sixth Circuit applied to determine whether an employee falls under the ministerial exception suffers from two grave deficiencies. First, the "primary duties" test unduly interferes with the autonomy of religious institutions to make their own judgments about the religious significance of their leaders' duties, and to control who teaches the faith to the next generation. Second, the "primary duties" test entangles secular courts in questions of religious doctrine. Further, the particular issue here—whether and to what extent a religious institution may insist that disputes be resolved internally—is, in many religious

traditions, an article of faith. Certiorari should be granted to bring clarity to this area of law, and to confirm that religious organizations may choose their leaders without undue government interference.

I. The Sixth Circuit's "Primary Duties" Test Ignores The Many Important Ways In Which Religious Institutions Pass On Their Faith To Future Generations.

At the heart of the ministerial exception is the understanding that a religious organization "in its collective capacity must be free to express religious beliefs, profess matters of faith, and communicate its religious message" to both faithful followers and the world at large. *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 306 (3d Cir. 2006). In order for that freedom to be meaningful, a religious institution "must retain the corollary right to select its voice." *Ibid.* That is, the organization must be permitted to control the clergy and leaders who speak on its behalf.

Indeed, many religious organizations speak with a religious voice even when they speak about seemingly secular topics. By requiring courts to decide which of a religious leader's duties are secular, and which are religious, the "primary duties" test impedes the ability of religious organizations to transmit their faith in ways other than the most overt religious instruction. By categorizing, distinguishing, and weighing the activities of a religious organization's leaders, the "primary duties" test does not and cannot respect the sanctity of the process by which a religious organization transmits the faith from one generation to the next.

A. Religious organizations must be able to control who teaches their faith.

The ministerial exception plays a vital role in ensuring that churches and religious organizations retain control over the selection and dismissal of their leaders. For *amici* and other churches and religious groups around the country, the right to control who teaches their faith, and who transmits the faith to the next generation, remains indispensible to the free exercise of religion.

Clergy and religious leaders are a church's "lifeblood"—the "chief instrument by which [it] seeks to fulfill its purpose." *McClure* v. *Salvation Army*, 460 F.2d 553, 558-59 (5th Cir. 1972). Accordingly, this Court has long recognized that government interference in matters of "church polity and church administration" poses a great risk of "implicating secular interests in matters of purely ecclesiastical concern." *Serbian E. Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 710 (1976) (quotation omitted). And nothing could be of more ecclesiastical concern than a church's choice of its own key leaders. *Ibid.*

Among those leaders are teachers in a church's religious schools. In light of the "admitted and obvious fact that the *raison d'etre* of parochial schools is the propagation of a religious faith," teachers play a "critical and unique role * * * in fulfilling the mission of a church-operated school." *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 501, 503 (1979). For this reason, in cases indistinguishable from this one, many courts have not hesitated to apply the ministerial exception to teachers in religious schools. See, *e.g.*, *Clapper* v. *Chesapeake Conference of Seventh-day Adventists*, 166 F.3d 1208 (4th Cir. 1998) (unpublished)

(teacher at Seventh-day Adventist school); *Coulee Catholic Sch.* v. *Labor & Indus. Review Comm'n*, 768 N.W.2d 868 (Wis. 2009) (teacher at Catholic school). The decision below is in square conflict with these decisions, warranting this Court's review.

B. The "primary duties" test denigrates religious activities that courts may misperceive as secular.

Invoking the "primary duties" test, the Sixth Circuit declined to apply the ministerial exception to Perich because, in the court's judgment, her "primary duties" did not "consist of teaching [the faith], spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." Pet. App. 20a. "[I]t is clear," the court thought, "that Perich's primary function was teaching secular subjects." *Ibid.* In fact, however, this was not at all clear. And precisely because it is rarely clear where a religious leader's "religious duties" end and her "secular duties" begin, the "primary duties" test should be rejected.

1. Perich led her class in prayer three times a day, conducted devotional exercises each morning, taught religion classes four days a week, took her students to weekly school-wide chapel services, and occasionally led those chapel services herself. Pet. App. 4a. As Perich herself testified, teaching at Hosanna-Tabor gave her the freedom to "bring God into every subject taught in the classroom." *Id.* at 5a.

Yet none of this mattered to the Sixth Circuit because Perich spent most of her day "teaching secular subjects." *Id.* at 20a. That court thus made its *own judgment* that Perich's so-called secular activities were more important to her role than the religious

ones. That is a debatable judgment, to say the least, and in all events a risky one for *the state* to make. Embedded within the judgment is a bias foreign to many religious faiths—that the quantity of devotional activity, rather than its quality, matters most.

The Sixth Circuit's judgment was also troubling for an even more fundamental reason, as it assumed that Perich's activities were in fact "secular." Pet. App. 20a. This too was a questionable judgment at odds with how many religious traditions understand their faith—and here, at odds with the description of Perich's position as her employer, the Church itself, had defined it. The Lutheran school's purpose here is to provide a "Christ-centered education" based on biblical principles. *Id.* at 4a-5a. But overt religious instruction is only one way to advance that purpose. The school also expects its teachers to serve as "Christian role models" and to "integrate faith into all subjects." *Id.* at 5a, 35a. Only the most distant view of religious schooling could assume that religious teachers inculcate their faith only by lecturing about God.

2. Although the Sixth Circuit's application of the "primary duties" test leaves much to be desired, the more fundamental problem is the nature of the inquiry that a court applying that test is required to conduct. The test draws a sharp distinction between a religious leader's "secular" and "religious" duties; and it asks courts to decide which of those duties are more important. As this Court has noted, however, the "prospect of church and state litigating in court about what does and does not have religious meaning touches the very core of the guarantee against religious establishment." *New York* v. *Cathedral Acad.*, 434 U.S. 125, 133 (1977). Yet that is exactly what the

"primary duties" test demands. Indeed, the very assumption that a religious leader's "secular duties" can be siphoned off and separately measured is impossible to reconcile with how many religious traditions understand their faiths.

Christianity. In many Christian traditions, for example, all deeds have a religious import: "whether ye eat, whether ye drink, or whatsoever ye do, do all to the glory of God." I *Corinthians* 10:31. Or, as the same point is expressed in the *Epistle of James* (2:18, 20): "show me thy faith without thy works, and I will show thee my faith by my works. * * * But wilt thou know, O vain man, that faith without works is dead?" While caring for orphans and widows may appear on its face to be a secular task, it would be anything but secular to followers of *James* 1:27: "Religion that God our Father accepts as pure and faultless is this: to look after orphans and widows in their distress."

Roman Catholicism. To take another example from the Christian faith, the Catholic tradition emphasizes the importance of a natural moral law that can be derived through reason, and need not find its source in biblical revelation. Yet moral instruction in a Catholic school could hardly be considered secular —even if it might appear that way from afar. In the Catholic understanding, moral inquiry and teaching arise from, and reinforce, religious duty. As Pope Pius XI wrote in the encyclical, *On Christian Education*, "all the teaching and the whole organization of the school, and its teachers, syllabus and text-books in every branch, [are to] be regulated by the Christian spirit, under the direction and maternal supervision of the Church." Recounting the words of Pope Leo XIII, Pope Pius XI explained: "It is necessary not only that religious instruction be given to the young

at certain fixed times, but also that every other subject taught, be permeated with Christian piety." All learning, in this view, is imbued with a "sacred atmosphere." *Ibid.*

Judaism. Jewish sources likewise illustrate how superficially secular activities can nevertheless hold religious significance to the faithful. Rabbi Joseph Soloveitchik writes: "As men of God, our thoughts, feelings, perceptions and terminology bear the imprint of a religious world outlook." Rabbinical Council Record, Feb. 1996, reprinted in N. Lamm & W. Wurzburger, *A Treasury of Tradition* 78-80 (1967). "We define ideas in religious categories and we express our feelings in a peculiar language which quite often is incomprehensible to the secularist." *Ibid.* It is easy for an outside observer, lacking a "religious yardstick" and unschooled in the "religious idiom," to fail to comprehend. *Ibid.*

These examples cannot begin to capture the richness and complexity of the Protestant, Catholic, and Jewish traditions, much less that of the many other religious denominations that abound. But they confirm that, in many religious traditions, it is not even coherent to distinguish between "religious" instruction, on one hand, and instruction on "secular" topics from a religious perspective, on the other.

These examples further underscore the wisdom in this Court's observation that the line between religious and secular duties "is hardly a bright one." *Amos*, 483 U.S. at 336. In light of the subtlety and complexity of the task, there is every reason to "be concerned that a judge would not understand [an institution's] religious tenets and sense of mission" (*ibid.*), particularly in cases involving religious minori-

ties or less familiar traditions. Courts will either misunderstand the religious institutions they are called upon to judge, or they will make an earnest attempt at understanding—in which case they will quickly find themselves in deep theological waters. What looks secular may not be; what looks unimportant may be indispensible.

3. Because the "primary duties" test requires courts to parse a religious leader's duties and make judgments about the religious significance of those duties, it inevitably entangles courts in religious matters.

Indeed, the risk of "excessive government entanglement" here mirrors the risk that this Court perceived in *Lemon* v. *Kurtzman*, 403 U.S. 602, 613 (1971) (quotation omitted). There, in determining whether state funding of teacher salaries in religious schools could be secular in nature, the Court declined to parse the teachers' religious and secular functions, finding instead that a "conflict of functions inheres in the situation." *Id.* at 617. After all, "a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral." *Id.* at 618. And to the extent that such conflicts are relevant when the government provides a religious school with aid, they are no less relevant when the government's actions interfere with the inner workings of a religious school's employment decisions.[2]

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[2] In the state-aid context, the Court subsequently held that parents' true private choice concerning where to send their children to school could obviate the dangers of entanglement. *Zelman* v. *Simmons-Harris*, 536 U.S. 639

4. In addition to entanglement, the "primary duties" test imposes a great practical burden on religious institutions. For one thing, it undermines the autonomy of religious institutions to pass on their teachings to the next generation in all but the most literal ways. It deprives religious organizations of the freedom to control leaders who play more subtle, but no less important, roles in passing on the faith. In addition, the difficulty of determining a religious leader's "primary duties"—as evidenced by the inconsistent results reached in cases involving religious school teachers, see Pet. 20-23—leaves religious institutions unable to know how a court might classify particular leaders. As this Court has recognized, it is "a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious." *Amos*, 483 U.S. at 336.

None of this is to suggest that every employee of a church or religious school must fall within the ministerial exception. As other circuits have recognized, it is possible to minimize entanglement while also ensuring that the ministerial exception does not reach employees whose duties, unlike those of a religious school teacher, are clearly secular. The test applied by the Ninth Circuit, for example, requires that an employee of a religious institution be "chosen for the

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(2002); cf. *Mitchell* v. *Helms*, 530 U.S. 793, 807-835 (2000) (plurality op.) (discussing constitutional limits on direct aid); *id.* at 857-867 (O'Connor, J. concurring) (same). Here too, the parallel with this case is instructive: Just as a parent's freedom to choose her child's school avoids entanglement in funding, so too a church's freedom to choose its leaders—and a minister's freedom to choose her vocation—avoids entanglement in employment.

position based largely on religious criteria" and "perform some religious duties." *Alcazar*, 598 F.3d at 676 (quotations omitted); see also *Starkman*, 198 F.3d at 176 (5th Cir.) (considering only whether a choirmaster "engaged in activities traditionally considered ecclesiastical or religious"); *Schleicher*, 518 F.3d at 478 (7th Cir.) (adopting a "presumption that clerical personnel" are subject to the ministerial exception). Such a test guards against abuse of the ministerial exception while avoiding the need for intrusive inquiry into a leader's "primary" duties. The circuit split should be resolved in favor of that more sensible approach.

II. By Requiring Courts To Second-Guess A Religion's Own Dispute Resolution Processes, The "Primary Duties" Test Entangles Courts In Questions Of Religious Doctrine.

The "primary duties" test presents a second risk of entanglement. Even a religious leader whose "primary duties" are secular may nevertheless be subject to an adverse employment decision motivated by religious reasons. Yet by looking only to a religious leader's duties, the "primary duties" test ignores the nature of the employment dispute and declines to apply the ministerial exception where the dispute is religious in nature. See *Rweyemamu* v. *Cote*, 520 F.3d 198, 208 (2d Cir. 2008) (rejecting test as "too rigid").

The result of this overly rigid standard is that the ministerial exception fails to screen out disputes that are at heart religious. Where a religious organization asserts a religious motive for discharging an employee, the employee typically responds by alleging that the religious motive is pretext. The inevitable result is to "entangle [the court] in doctrinal disputes"

over the sincerity, coherence, or truth of the religious motive. *Ibid.* For example, to resolve a church's claim that it fired its organist for his inappropriate choice of music at Easter Mass, the courts would have had to "resolve a theological dispute" over the "liturgically proper music." *Tomic* v. *Catholic Diocese*, 442 F.3d 1036, 1040 (7th Cir. 2006) (rejecting "primary duties" test). Although the ministerial exception is not limited to such theological disputes, it must—at a minimum—keep courts out of disputes of that nature.

This case illustrates why the "primary duties" test will often fail to achieve that fundamental objective. For here, the Church's own bylaws, like those of many other religious bodies, required that the dispute be resolved not through litigation, but through internal Church processes.

A. The Church's bylaws provided for internal resolution of this dispute in a "manner pleasing to God."

Here, Perich characterizes her firing as retaliation for threatening suit under the ADA. The Church essentially agrees with what happened, but explains that she was fired for what it concluded was her *un-Christian* behavior—for insubordination and failing to participate in the church's internal dispute resolution process. The Church's bylaws explain that process:

> The Holy Scriptures (1 *Cor.* 6:1-7) urge Christians to settle their differences by laying them before the "members of the brotherhood." Therefore, *the Synod, in the spirit of 1 Corinthians 6, calls upon all parties to a disagreement, accusation, controversy, or disciplinary action to rely exclusively and fully on the Synod's system of reconciliation and*

> *conflict resolution*. The use of the Synod's conflict resolution procedures shall be the exclusive and final remedy for those who are in dispute.

Pet. App. 77a (emphasis added). The bylaws go on to describe a lengthy series of rules, exceptions, and procedures for resolving disputes within the Church. *Id.* at 77a-104a.

This dispute resolution process is explicitly intertwined with Church doctrine; it seeks to resolve disputes over a leader's "[f]itness for ministry" in a "manner pleasing to God." *Id.* at 77a, 78a. Under the decision below, therefore, resolving this case will require the district court to decide what the Church's procedures require—what, in the Church's view, truly pleases God.

B. Many religious traditions believe in resolving disputes internally.

The Church's reason for dismissing Perich—her failure to avail herself of religious dispute resolution processes—is just one example of the many religiously-grounded reasons a religious organization may have for taking an employment action. Any religiously-grounded reason raises the same entanglement concern; the concern need not be limited to religious dispute resolution. Nevertheless, the views of the Missouri Synod are not uncommon. Many religious traditions stress the need to resolve disputes within the faith, and the widespread nature of such beliefs further underscores the need for review.

As one commentator has noted: "Whether or not lawyers like to admit it, human beings with scores to settle did not go straight from clubbing each other with rocks and bones to serving each other with summons." R. Seth Shippee, *"Blessed Are the Peace-*

makers": Faith-Based Approaches to Dispute Resolution, 9 ISLA J. INT'L & COMP. L. 237, 237-238 (2002). Even in the age of the summons, "traditional, faith-based alternatives to the mainstream legal system are alive and well." *Id.* at 238.

Judaism. Judaism, for example, has a long tradition of internal dispute resolution. At the heart of the Jewish approach is the concept of ***shalom***, or peace. *Id.* at 249. Jewish law commands religious leaders to avoid conflict in their communities by promoting peace. Forms of dispute resolution range from informal mediation conducted by a single individual, known as ***p'sharah***, to more formal adjudication by an official rabbinic court, known as a ***beth din***. *Id.* at 251-53. ***Beth dins*** rely primarily on Jewish law (***halacha***) in reaching their decisions, and typically involve a panel of three rabbinic judges.

Under traditional Jewish law, Jews are prohibited from accusing other Jews in a secular court. In the words of the great rabbinic scholar Moses Maimonides, one who forgoes a ***beth din*** has behaved "as if he had raised his hand against the Torah." ***Hoshen Mishpat*** 26:1. Some modern Jewish authorities likewise hold that "[a] central principle of halacha is that disputes between Jews should be adjudicated in duly-constituted rabbinical courts." Dov Bressler, *Arbitration and the Courts in Jewish Law*, 9 J. HALACHA & CONTEMP. SOC'Y 105, 109 (1985).

Protestant Christianity. Christianity has a similar history of intra-faith dispute resolution. The early Christians did not permit the use of the Roman courts, and some contemporary Christian teachings strongly encourage resolving disputes within the faith. See, *e.g.*, Alice Curtis, *Good Question: Should*

Christians Sue?, CHRISTIANITY TODAY, Aug. 6, 2001 (instructing that "a Christian must evaluate more than just the letter of the law").[3]

This aversion to resolving disputes in secular courts finds support in many passages of the New Testament. In his First Letter to the Corinthians, for example, the Apostle Paul asked, "If any of you has a dispute with another, dare he take it before the ungodly for judgment instead of before the saints?" I *Corinthians* 6:1 He answered, "The very fact that you have lawsuits among you means you have been completely defeated already." I *Corinthians* 6:7.

Christians are urged to forgive one another, and in some circumstances to resolve their differences out of court—particularly when the dispute is one among fellow believers. As a result, hundreds of Protestant Christian denominations, churches, and organizations offer their own intra-faith dispute resolution services. See Shippee, *Blessed Are the Peacemakers*, at 242-245.

Roman Catholicism. In another Christian tradition, building on those sources from the New Testament, Catholic teachings similarly discourage litigation between fellow members of the Church. In the Catholic understanding, disputes between Church members are of concern to the whole Church, not merely the individual disputants. If "dispute resolution processes are not congruent with the nature and teaching of the Church, the image of the Church may be distorted and the integrity between the Church and its members jeopardized." J. Michael Fitzgerald

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[3] Available at http://www.christianitytoday.com/ct/2001/august6/27.66.html.

& Lynne M. L. Fitzgerald, *Meditation: A Systemic Alternative to Litigation for Resolution of Church Employment Disputes*, 5 ST. THOMAS L. REV. 507, 510 (1993).

The 1917 Code of Canon Law thus provided a system for resolving disputes over administrative action—such as employment disputes—which makes bishops responsible for conciliation. Canons 1732-1739. And in the years since, more formal processes have been explored and many Catholic dioceses have adopted their own systems for internal dispute resolution. Fitzgerald & Fitzgerald, *Meditation*, at 524-525.

Islam. Islamic tradition too emphasizes internal dispute resolution. The Quran provides instruction as to how Muslims should resolve disputes, much of which centers around the concept of *sulh*, meaning "settlement." Hence the Quranic verse (4:128): "[I]t shall not be wrong for the two to set things peacefully to rights between them: for sulh is best." Islamic tradition relies on special intermediaries, known as *quadis*, who interpret Islamic law and seek to resolve disputes between Muslims.

In sum, the Lutheran Church–Missouri Synod is far from alone in preferring that its adherents—and especially its leaders—resolve disputes with other believers within the Church before rushing to court. For a great many faiths, it is critical that they be able to resolve disputes between co-religionists in their own ways, and with minimal government interference. Doing so maintains the integrity of the religious community, and preserves its witness to the culture at large.

C. The ministerial exception should preclude second-guessing a religious employer's adherence to church teaching.

When a preference for internal dispute resolution is implicated by an employee's retaliation claim, a weak ministerial exception invites secular courts to second-guess the sincerity and scope of that preference. Entanglement will inevitably ensue.

The Court recognized this danger in *Serbian Eastern Orthodox Diocese*, a dispute involving a bishop who had been "defrocked" on the ground that he no longer possessed the necessary "fitness to serve as Bishop." 426 U.S. at 702. The Illinois Supreme Court deemed the Bishop's removal to have been "arbitrary" because the Church "had not followed its own laws and procedures in arriving at [its] decision[]." *Id.* at 712-713. But this Court reversed, observing that any attempt to determine whether the Church's actions were arbitrary "must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else in to the substantive criteria by which they are supposedly to decide the ecclesiastical question." *Id.* at 713. That is "exactly the inquiry that the First Amendment prohibits." *Ibid.*

If it must decide whether a church's actions are "arbitrary," a court will inevitably be obliged to "substitute[] its own inquiry into church polity and resolutions" for that of the church's. *Id.* at 708. Such an exercise will risk "judicial rewriting of church law" in "circumvention of the tribunals set up to resolve internal church disputes." *Id.* at 719-720. These concerns strongly favor a ministerial exception that

avoids any such entanglement with religious dispute resolution processes.

* * * * *

Although the courts below are unanimous in their acceptance of the ministerial exception, some (like the Sixth Circuit) have adopted tests that frustrate the doctrine's purpose of minimizing entanglement. This Court's review is needed, therefore, not only because a robust and properly-defined ministerial exception is critical to the ability of religious institutions to control the transmission of their faith to the next generation, but also because religious institutions such as the *amici* here need predictability. Even circuits ostensibly applying the same standard have reached conflicting results on the question presented here—whether the ministerial exception applies to sectarian school teachers. This question is of the utmost importance to religious groups of every conceivable stripe.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A:
LIST OF *AMICI*

The *International Mission Board of the Southern Baptist Convention* (IMB) is an entity of the Southern Baptist Convention, the nation's largest evangelical denomination with more than 40,000 churches and nearly 16 million members. To achieve its vision of seeing a multitude of every people, tribe, and tongue from around the world come to worship and exalt Jesus Christ as Lord and Savior, the IMB employs more than 5,000 Christian workers.

The *International Society for Krishna Consciousness* (ISKCON) is a monotheistic, or Vaishnava, tradition within the broad umbrella of Hindu culture and faith. There are approximately 500 ISKCON temples worldwide, including 50 in the United States. As part of its tradition, ISKCON has affiliated parochial schools that teach secular topics as well as spiritual subjects and values. It is a core belief among ISKCON members that religiously qualified teachers should teach in ISKCON's schools and should be appropriate role models in their belief, practice, and application of spiritual ethics. ISKCON has an interest in this case because it supports an interpretation of the ministerial exception that protects the autonomy of its temples and schools to implement their spiritual values.

The *Council of Hindu Temples of North America* is a voluntary association of Hindu Temples in North America. It is one of the largest Hindu umbrella bodies in North America, with a membership of over 100 Hindu Temples. The council advocates on behalf of Hindu Temples and Hindus in both the United States and Canada. The Council has an interest in this case

because it supports an interpretation of the ministerial exception that recognizes the religious nature of Hindu Temple workers such as priests, *swamis*, monks, *paricharakaras* (religious food preparers), *sthapatis* (religious architects), and *shilpis* (religious artisans). Although such roles may be unfamiliar to the secular court system, they have been recognized by Hindus as religious for millennia, and are integral to the religious life of Hindu Temples.

The *Union of Orthodox Jewish Congregations of America* (UOJCA) is a non-profit organization representing nearly 1,000 Jewish congregations throughout the United States. Founded in 1898, it is the largest Orthodox Jewish umbrella organization in the nation. Through its Institute for Public Affairs, the UOJCA advocates legal and public policy positions on behalf of the Orthodox Jewish community. The American Orthodox Jewish community has flourished in no small measure due to the constitutional freedoms that allow it to educate its children in Jewish "day schools." Such schools offer children a dual curriculum that combines standard secular studies with extensive in-depth study of Jewish religious texts and teachings. Many Jewish day schools strive to integrate study of the secular and the sacred, such that teachers in the English or science classroom are as much engaged in "Jewish education" as those teaching Bible and Talmud. The schools' ability to recruit and employ teachers capable of this type of teaching is essential to the educational enterprise, and thus critical to the welfare of the American Jewish community.

The *National Council of Young Israel* (Young Israel) is a Jewish religious organization that seeks to promote the religious observance of the families that

attend the Jewish congregations that comprise its membership. Young Israel was established in 1912, when observance of Torah laws and customs required extraordinary sacrifice. Young Israel worked tirelessly then and continues to do so now to facilitate and enhance the Torah observance of its congregational constituents. Today, Young Israel's membership includes approximately 150 congregations (representing approximately 25,000 families) and it additionally represents hundreds of synagogues, Jewish day schools, and Jewish community institutions throughout the United States. Young Israel's principal objective is to foster and maintain a program of spiritual, cultural, social, and communal activity towards the advancement and perpetuation of traditional Torah-true Judaism. Young Israel joins this brief in support of protecting the autonomy of religious associations—a freedom that has permitted traditional Torah-true Judaism to flourish in this country.

UNITED SIKHS is an international, nonprofit, nonpartisan organization that has 11 chapters globally. UNITED SIKHS has four major thematic areas: (1) International Civil and Human Rights Advocacy (ICHRA); (2) Humanitarian Disaster Relief; (3) Education; and (4) Community Health Care. In defending religious freedom both domestically and internationally, UNITED SIKHS has seen the detrimental effects of government policies that restrict religious rights. UNITED SIKHS is thus compelled to voice its concern when it is witness to the government's encroachment on constitutional rights that safeguard a faith group's choice in selecting its religious leaders.

The *Lutheran Church–Missouri Synod* (the Synod) is a nonprofit religious corporation organized under

the laws of the State of Missouri. With more than 6,000 member congregations and 2.3 million baptized members, it is the second-largest Lutheran denomination in North America. For generations the Synod, which places great importance on the Christian education of its children, has operated one of the largest Protestant religious school systems in the United States. Today, the Synod roster of commissioned ministers includes more than 10,000 teachers. The Synod has a profound interest in its First Amendment rights and in the preservation of the ministerial exception to safeguard against judicial intervention in the church's decisions regarding hiring and terminating its ministers, including commissioned ministers serving as teachers.

AMICUS CURIAE BRIEF

No. 10-553

IN THE

Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF RELIGIOUS ORGANIZATIONS AND INSTITUTIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

No. 10-553

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,
Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,
Respondents.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Supreme Court Rule 37.2(b), Loma Linda University, the General Council on Finance and Administration of The United Methodist Church, the Association of Christian Schools International, the Church State Council of the Pacific Union Conference of Seventh-day Adventists, Church Communities International, and Adventist Health (collectively, "*Amici*") hereby request leave to file the accompanying *amici curiae* brief. This brief is submitted in support of granting the petition for a writ of certiorari.

Counsel for Petitioners has consented to the filing of this brief. The Office of the Solicitor General has consented for Respondent EEOC. Counsel for Respondent Perich, however, has declined to consent, while indicating that she will not oppose the motion.

As set forth in the accompanying brief, *Amici* are religious institutions that are directly impacted by the scope of the ministerial exception or which advise their denominations on these issues. *Amici* and their affiliated denominations have hundreds of thousands of ordained and lay employees, and operate or support, directly or indirectly, institutions including houses of worship, schools, hospitals, nursing homes, and social service facilities. *Amici* have specific interests in the ministerial exception, which governs the extent to which courts will intervene in *Amici*'s ability to determine who will carry out religious duties central to *Amici*'s religious and pastoral missions.

Church Communities International, for instance, is an international Christian communal movement in which everything is shared in common and most members live together in rural communities. As part of the living proclamation of their faith, members participate in the community through daily work. Work is integral to members' religious vocation, making the distinction between secular and sacred exceptionally difficult to parse.

Loma Linda University and the Association of Christian Schools International have substantial interests in the application of these standards in the context of educational ministries that could be deemed secular activities under some readings of the ministerial exception.

The General Council on Finance and Administration of The United Methodist Church and Church State Council of the Pacific Union Conference of Seventh-day Adventists, safeguard their respective denominations' legal interests and rights, and could

face a surge in litigation if certain ministries are deemed to be secular.

Adventist Health is a faith-based medical institution whose goal is to share God's love by providing physical, mental and spiritual healing, in a manner that expresses and embodies the distinctive religious importance of care of the whole person within Adventist theology, but some of whose ministries would lose some legal protection under the test applied below.

The instant case presents a question fundamental to the protection of religious liberty for all, but particularly for these *Amici*. The decision below alters the ministerial exception so as to oblige courts to delve into religious doctrine in order to deem whether an employee performs religious or secular activities, thereby injecting the State into the internal affairs of religious institutions.

Amici believe that the decision below, if affirmed, would both entangle the State with religion, and would chill the free exercise of religious liberty among religious organizations across America. This issue arises here in the context of Petitioner's claim, involving a school and a specifically designated minister. The issues presented, however, apply to situations more broadly than those addressed in the petition. *Amici* are uniquely situated to speak to those broader implications, and do so in the attached brief.

Amici therefore respectfully request leave to file the accompanying brief containing discussion of the wider implications of narrowing the ministerial exception on religious liberty.

Respectfully submitted,

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INTERESTS OF *AMICI CURIAE*[1]

Amici are religious organizations and institutions with hundreds of thousands of religious and lay employees. *Amici* further their religious missions through both clergy and non-ordained employees charged with religious responsibilities or other duties integral to *Amici*'s ministries.

Amici and their affiliated denominations operate or support, directly or indirectly, thousands of religious institutions such as schools and universities, hospitals and nursing homes, and social service providers. Such facilities both benefit the community at large, as well as advance *Amici*'s ministry. *Amici* therefore have a direct and substantial interest in the scope and application of the ministerial exception. *Amici*'s ability to structure their internal hierarchies, employment relationships, and the delivery of services are impacted by the limits of the ministerial exception.[2]

INTRODUCTION

Courts risk both establishing certain religions and prohibiting the free exercise of others when they undertake to define the ways in which the law will recognize religious expression. Courts are ill-suited to declare what is religiously orthodox and who may convey the orthodox faith and teachings for any

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[1] No person or entity other than *Amici* made a monetary contribution to this brief's preparation or submission. No counsel for a party authored this brief in whole or in part or made a monetary contribution to its preparation or submission. Counsel for all parties received timely notice of the filing of this brief and all parties except Respondent Perich have consented to the filing. The letters of consent have been filed.

[2] Individual *Amici* are described in the appendix.

religious organization. The "ministerial exception" avoids this conflict by declining to adjudicate the employment rights of "ministerial" employees—those ordained or lay employees of a religious organization whose duties are central to its pastoral mission.

The lower courts, however, are conflicted as to the scope of this exception. Some remain focused on the concerns that animate the exception—avoiding entangling courts in matters of church doctrine and leadership. Others, such as the court below, have ossified the exception into a mechanistic inquiry divorced from its purposes. This second group of courts, applying a "primary duties" test, endeavor to determine whether an employee is "ministerial" by assessing whether the employee's duties are religious. In doing so, they wade into the very conflict the exception was intended to avoid.

The division among the circuits results in substantively different outcomes in factually indistinguishable cases. In light of the number of religious organizations and institutions across the country, the division among the lower courts well merits this Court's attention. *Amici* rely heavily on the ministerial exception as a bulwark against the prospect of courts probing into their internal affairs, particularly given that the religious practices of faiths with fewer adherents can be poorly understood by those outside of their faiths. The prospect that courts may later question – hour by hour – the activities that a faith deems relevant for spiritual formation of its ministers can easily erode that faith's independence in determining what it believes to be the best course for its ministers – however it defines them. The need for clarity is especially important given that many affected religious organizations lack the resources to engage in protracted employment

litigation, and the credible threat of such litigation, even when meritless, can significantly diminish the resources they can devote to their ministries.

REASONS FOR GRANTING THE PETITION

I. THE PETITION PRESENTS A DEEP AND MATURE SPLIT AMONG THE LOWER COURTS THAT RESULTS IN THE DISPARATE ADJUDICATION OF CORE CONSTITUTIONAL FREEDOMS

It is long settled that courts do not adjudicate the internal affairs of religious organizations. See *Serbian E. Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 708-09 (1976); *Presbyterian Church* v. *Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 446-47 (1969); *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 114-16 (1952); *Gonzalez* v. *Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929); *Watson* v. *Jones*, 80 U.S. 679, 726-32 (1871). In order to avoid entanglement with religion or trenching upon free exercise the lower courts have, since *McClure* v. *Salvation Army*, 460 F.2d 553 (5th Cir. 1972), unanimously exempted "ministerial" employees from certain employment laws.[3] This

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3 *See, e.g.*, *Natal* v. *Christian & Missionary Alliance*, 878 F.2d 1575, 1577-78 (1st Cir. 1989); *Rweyemamu* v. *Cote*, 520 F.3d 198, 205 (2d Cir. 2008); *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 305 (3d Cir. 2006); *Rayburn* v. *Gen. Conf. of Seventh-day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985); *Clapper* v. *Chesapeake Conference of Seventh-day Adventists*, No. 97-2648, 1998 WL 904528, at *1 (4th Cir. Dec. 29, 1998) (unpublished); *McClure*, 460 F.2d at 560; *Hollins* v. *Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007); *Schleicher* v. *Salvation Army*, 518 F.3d 472, 477-78 (7th Cir. 2008); *Scharon* v. *St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360 (8th Cir. 1991); *Alcazar* v. *Corp. of the Catholic Archbishop of Seattle*, 598 F.3d 668, 670, reh'g granted, 617 F.3d 401 (9th Cir. 2010); *Bryce* v.

exception extends to persons beyond those who are ordained ministers.[4]

But the consensus ends there; the more frequently courts have addressed its scope, the more divergent the "ministerial exception" has become. As the petition ably explains, twelve federal circuits are sharply divided: four apply a "primary duties" test, four reject that test in favor of a more holistic analysis, and four resolve the issue on a case-by-case basis. State courts have similarly divergent views. These competing approaches result in inconsistent outcomes in factually indistinguishable cases.

A. The federal courts of appeals are conflicted as to the proper application of the ministerial exception.

1. *The Primary Duties Test*: The Third, Fourth, Sixth, and D.C. Circuits embrace a "primary duties" test, which, in general terms, applies the exception where an "employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." *Rayburn* v. *Gen. Conf. of Seventh-day Adventists*, 772

Episcopal Church in the Diocese of Colo., 289 F.3d 648, 656-58 (10th Cir. 2002); *Gellington* v. *Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1304 (11th Cir. 2000); *EEOC* v. *Catholic Univ. of Am.*, 83 F.3d 455, 460-61 (D.C. Cir. 1996). The Federal Circuit does not have jurisdiction over cases that would present the issue in the normal course.

[4] *See, e.g.*, *Rweyemamu*, 520 F.3d at 206-07; *Petruska*, 462 F.3d at 307; *Clapper*, 166 F.3d 1208, 1998 WL 904528 at *7-8; *Hollins*, 474 F.3d at 226-27; *Starkman* v. *Evans*, 198 F.3d 173, 177 (5th Cir. 1999); *Tomic* v. *Catholic Diocese of Peoria*, 442 F.3d 1036, 1042-43 (7th Cir. 2006); *Scharon*, 929 F.2d 362-63; *Alcazar*, 498 F.3d at 676-77; *Bryce*, 289 F.3d at 659; *Catholic Univ. of Am.*, 83 F.3d at 460-61.

F.2d 1164, 1169 (4th Cir. 1985). In assessing particular roles, these courts inquire whether these duties are "important to the spiritual and pastoral mission of the church." *Id.*

The circuits that employ this test, however, disagree as to its application. The decision below reflects a quantitative approach. The Sixth Circuit grounded its decision in the fact that plaintiff spent only "forty-five minutes of the seven hour school day" engaged in what *it* deemed to be explicitly religious activity. Pet. App. 19a-20a. See also *Redhead* v. *Conf. of Seventh-day Adventists*, 440 F. Supp. 2d 211, 221 (E.D.N.Y. 2006) (ministerial exception did not apply because "[plaintiff's] religious [duties] were limited to only one hour of Bible instruction per day"); *Guinan* v. *Roman Catholic Archdiocese of Indianapolis*, 42 F. Supp. 2d 849, 852 (S.D. Ind. 1998) (ministerial exception did not apply because "the vast majority of [plaintiff's] duties involved her teaching secular courses").

The other "primary duties" circuits take a more qualitative approach, focusing less on the proportion of time spent on various activities, and more on the "function of [an employee's] position" within the religious organization. *Rayburn*, 772 F.2d at 1168; See also *EEOC* v. *Catholic Univ. of Am.*, 83 F.3d 455, 461 (D.C. Cir. 1996); *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 304 n.6 (3d Cir. 2006). These circuits have recognized that the duration of an activity is not always the best metric of its significance. See, *e.g.*, *Clapper* v. *Chesapeake Conference of Seventh-day Adventists*, No. 97-2648, 1998 WL 904528, at *7 (4th Cir. Dec. 29, 1998).

2. *Avoidance of Entanglement*: Other circuits eschew focusing on specific duties, or the amount of time spent performing them, in favor of a more

holistic analysis directed at "avoid[ing] judicial involvement in religious matters." *Schleicher* v. *Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008).

Two circuits have expressly rejected the "primary duties" test as "too rigid," *Rweyemamu* v. *Cote*, 520 F.3d 198, 208 (2d Cir. 2008), or as "suspect," "arbitrary" and "problematic," *Alcazar* v. *Corp. of the Catholic Archbishop of Seattle*, 598 F.3d 668, 675-76, reh'g granted, 617 F.3d 668 (9th Cir. 2010). Thus, in *Alcazar*, the Ninth Circuit concluded that Catholic seminarians were "ministerial" employees for purposes of the exception, regardless of the fact that their duties consisted primarily of maintenance work. *Id.* at 675. The court rejected the "arbitrary 51% requirement implicit in the 'primary duties' test," in favor of a "functional approach" that considers whether the plaintiff was selected "largely on religious criteria" and "performs some religious duties and responsibilities." *Id.* at 675-76. It did so in an "acknowledg[ement] that secular duties are often importa... to a ministry," and secular courts should not be in the business of determining when a "secular" duty has religious significance. *Id.* at 676.

In *Rweyemamu*, the Second Circuit stressed the importance of examining not only an employee's particular duties but also the nature of the dispute, to confirm that the court would not become entangled in competing religious viewpoints. 520 F.3d at 207-09.

The Fifth and Seventh Circuits have similarly rejected the primary duties approach by adopting different tests. In *Starkman* v. *Evans*, the Fifth Circuit examined: (1) whether the employee was hired "largely on religious criteria;" (2) whether the employee was "qualified and authorized to perform the ceremonies of the church;" and (3) whether the employee "engaged in activities traditionally

considered ecclesiastical or religious." 198 F.3d 173, 175-77 (5th Cir. 1999) (quotations omitted). Applying this test, it concluded that a music director's involvement in the church's pastoral mission was ministerial for purposes of the exception. See also *Tomic* v. *Catholic Diocese of Peoria*, 442 F.3d 1036, 1040-41 (7th Cir. 2006) (noting the Church obviously cares "whether the words of the Gospel are set to Handel's *Messiah* or to 'Three Blind Mice'").

Rather than attempt to categorize particular activities as "secular" or "religious," these circuits focus on whether the employee had substantial duties that were considered religious from the standpoint of the particular religious organization in question. For example, the Seventh Circuit concluded in *Schleicher* that employees of the Salvation Army who administered an adult rehabilitation center were ministerial, because the Salvation Army viewed operation of the facilities as part of its spiritual mission. 518 F.3d at 477. The court thus adopted a rebuttable presumption that clerical personnel—as designated by the institution—are not covered by the relevant employment statute. *Id.* at 477-78.

The four remaining circuits have addressed the ministerial exception without embracing a particular standard or commenting on the "primary duties test." See, *e.g.*, *Natal* v. *Christian & Missionary Alliance*, 878 F.2d 1575, 1576-77 (1st Cir. 1989) (applying exception to pastor's suit against church where alleged property dispute "would require judicial intrusion into rules, policies, and decisions which are unmistakably of ecclesiastical cognizance."); *Scharon* v. *St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362-63 (8th Cir. 1991) (applying ministerial exception to hospital chaplain's ADEA and Title VII claims where the chaplain had expressly religious

duties in a church-affiliated hospital); *Skrzypczak* v. *Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1244 (10th Cir. 2010) (applying exception to Catholic Director of Department of Religious Formation where she was "important to the spiritual and pastoral mission of the [Diocese]" and adjudicating the claim would "involve gross substantive and procedural entanglement with the Church's core functions, its polity, and its autonomy") (quotations omitted); *Gellington* v. *Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1302-04 (11th Cir. 2000) (applying exception to church minister, observing that "the exception only continues a long-standing tradition that churches are to be free from government interference in matters of church governance and administration").

B. The state courts are similarly in conflict.

State courts similarly disagree as to the scope and nature of the ministerial exception.[5] Several apply some variant of the primary duties test. See, *e.g.*, *Weishuhn* v. *Catholic Diocese of Lansing*, 787 N.W.2d 513, 516-17 (Mich. Ct. App. 2010) (finding Catholic school math teacher was ministerial under a four-part version of the qualitative primary duties test); *Archdiocese of Washington* v. *Moersen*, 925 A.2d 659, 669 (Md. 2007) (applying quantitative primary duties test to conclude that a church organist was not a ministerial employee because his sole role was to play the organ); *Pardue* v. *Ctr. City Consortium Sch. of the*

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[5] Indeed, the Court currently has before it the petition in *Cooke* v. *Tubra*, No. 10-559 (Oct. 22, 2010), which seeks review of an Oregon decision, *Tubra* v. *Cooke*, 225 P.3d 862 (Or. Ct. App. 2010), considering the application of the ministerial exception to a defamation dispute between a pastor and his former church.

Archdiocese of Washington, Inc., 875 A.2d 669, 677 (D.C. 2005) (embracing the qualitative primary duties test, because "merely enumerating the duties" of a principal at a Catholic school failed to grasp the religious significance of her work). The Wisconsin Supreme Court applies a "functional" version of the primary duties test, rejecting the quantitative approach as "narrow" and "intrusive[]" because, "as a practical matter," it means that "the state can interfere with the hiring and firing of the leaders of religious organizations...so long as the leaders are spending (presumably) 49 percent or less of their time or tasks on whatever the court determines to be 'religious' activities." *Coulee Catholic Schs.* v. *Labor & Indus. Review Comm'n*, 768 N.W.2d 868, 882 (Wis. 2009) (holding that an elementary school teacher at a Catholic school was a ministerial employee).

The New Jersey Supreme Court agrees with the Second Circuit's view in *Rweyemamu*, that courts applying the ministerial exception should consider "the nature of the dispute." 520 F.3d at 208. It held that the "critical factor" is whether the "resolution of the claim requires an impermissible inquiry into the propriety of a *decision* of core ecclesiastical concern." *McKelvey* v. *Pierce*, 800 A.2d 840, 857-58 (N.J. 2002) (emphasis in original). The Supreme Judicial Court of Massachusetts, on the other hand, has refused to consider the nature of a plaintiff's claims because it is "hard to conceive...how a court could inquire into the reasons for the defendants' decisions...without intruding into matters of the internal management of the Diocese." *Williams* v. *Episcopal Diocese of Mass.*, 766 N.E.2d 820, 825-26 (Mass. 2002).

Finally, several state courts have applied the ministerial exception without articulating any test. See, *e.g.*, *Cha* v. *Korean Presbyterian Church of*

Washington, 553 S.E.2d 511, 514-515 (Va. 2001) (educational pastor could not proceed against church deacons); *Williams*, 766 N.E.2d 820 (Episcopal priest's discrimination claims barred).

C. Disparate Applications of the Ministerial Exception Result in Markedly Inconsistent Outcomes.

Despite nearly 40 years to frame the issue, the lower courts have failed to coalesce around any unified, or even majority, approach to applying the ministerial exception. Quite the contrary, the varied approaches result in tangibly different outcomes depending on where a case arises. This impact is well-illustrated by applying the test adopted below to ministerial exception cases resolved under different standards in other circuits. Contrary to the decisions in those courts, under the Sixth Circuit's test:

- Catholic seminarians performing maintenance work in a church would not be ministerial—notwithstanding the religious basis for their self-abnegation and service to the church community—because the number of hours spent cleaning far exceeded the number spent on activities the court deemed religious. As the Ninth Circuit recognized in declining to apply the primary duties test: "If taken literally, the primary duties test would require the district court to examine the number of hours [the plaintiff] spent on maintenance and the number of hours he performed religious duties." *Alcazar*, 598 F.3d at 675.

- Ordained Salvation Army ministers directing a rehabilitation center and thrift shops would not be ministerial employees, even though, as the Seventh Circuit explained, the Salvation Army's

operation of such facilities "has a spiritual dimension." *Schleicher*, 518 F.3d at 477. Even though the Salvation Army viewed its sales activities as a central means of witnessing, the hours spent managing would outweigh the moments of spiritual witness.

- Music directors or choirmasters, like the plaintiffs in *EEOC* v. *Roman Catholic Diocese of Raleigh*, 213 F.3d 795 (4th Cir. 2000); *Tomic*, 442 F.3d 1036 and *Starkman*, 198 F.3d 173, would not be ministerial employees, because selecting or playing music was deemed a secular function—notwithstanding the fact that, as the Fourth Circuit described it, directing a church choir is "bound up in the selection, presentation and teaching of music, which is an integral part of...worship and belief." *Raleigh*, 213 F.3d at 802. The quantitative primary duties test does not make room for consideration of whether a "secular" activity like teaching music has "spiritual moorings." *Id.*

- The communications manager of a church responsible for conveying its religious messages would not be a ministerial employee—even if she "served as a liaison between the Church and the community to whom it directed its message," *Alicea-Hernandez* v. *Catholic Bishop of Chicago*, 320 F.3d 698, 704 (7th Cir. 2003)—because of the number of hours spent communicating "secular" messages. For this reason, the Seventh Circuit in *Alicea-Hernandez* rejected the hours-counting approach as insensitive to the significance of the communication manager's role as the voice of the church. *Id.* ("'[D]etermination of whose voice speaks for the church is *per se* a religious matter.'") (quoting

Minker v. *Baltimore Annual Conference of the United Methodist Church*, 894 F.2d 1354, 1356 (D.C. Cir. 1990)).

- A chaplain at a religious university, such as the plaintiff in *Petruska*, 462 F.3d at 305, would not necessarily be a ministerial employee under the hours-counting primary duties test, because a university chaplain counsels students much like a secular guidance counselor. The frequency of providing guidance, compassion and comfort could very well far exceed the time the chaplain spent praying or performing religious rituals.
- Finally, under the primary duties test, even a quintessentially religious person, a monk, may not be a ministerial employee, even if he serves solely to maintain the physical buildings of a monastery. In a telling hypothetical, Judge Posner noted that monks' sale of wine made at their monastery could be construed as either religious or secular. *Schleicher*, 518 F.3d at 476-77. For a court to characterize the degree of religiousness in such activity "would plunge a court deep into religious controversy and church management" that touches on the heart of the Free Exercise clause. *Id.* at 477.

This case, too, would have turned out differently had it arisen in a different jurisdiction. The Seventh Circuit would have applied its presumption that a "commissioned minister" comes within the exception. Pet. App. 3a-4a, 33a-34a. Absent (very surprising) evidence that the Lutheran Church—Missouri Synod was engaged in some sort of sham, the Church would have prevailed. *Schleicher*, 518 F.3d at 477-78. The Fifth and Ninth Circuits would have credited the fact that Perich undertook university level theological training in order to be a "called" teacher, and agreed

to be subject to the same internal dispute resolution process as the Church pastor. Pet. App. 51a. Despite teaching subjects deemed principally "secular," Perich accepted her calling to serve as a "Christian role model" and to "integrate faith into all subjects." Pet. 4, 5a, 35a. Because she was hired based on expressly religious criteria, and performed some expressly religious duties, the exception would have applied. See *Alcazar*, 598 F.3d at 675-76; *Starkman*, 198 F.3d at 175-77.

Indeed, this case may have come out differently even if decided by one of the other "primary duty" jurisdictions. For example, in *Clapper*, 1998 WL 904528, the Fourth Circuit repudiated a purely quantitative application of the primary duties test and applied the ministerial exception to a religious elementary school teacher. The court recognized the teacher's assertion that he spent "only 10.6% of his work week" on overtly religious activities, but also credited the fact that the school's education code "ma[de] abundantly clear...that the primary purpose of Seventh-day Adventist elementary education is the redemption of each student's soul." *Id.* at *4, *7. In concluding that the teacher was a ministerial employee, the court was not dissuaded by the fact that only one of thirteen identified responsibilities for teachers was explicitly religious, because, as the court explained, "nothing...suggests that the differing general responsibilities are considered of equal importance." *Ibid.* On facts indistinguishable from this case, the outcome was precisely the opposite.

As these examples demonstrate, the divergence among the lower courts results in substantively different outcomes, appropriate for this Court's review.

II. THE PETITION RAISES AN ISSUE OF NATIONAL IMPORTANCE AS THE INCONSISTENT STANDARDS IN THE LOWER COURTS HINDER THE ABILITY OF HUNDREDS OF CHURCHES AND OTHER RELIGIOUS ORGANIZATIONS TO STRUCTURE THEIR MINISTRIES.

The split described above has a broad, national impact. Across the United States a wealth of different religions practice widely-varied means of spiritual expression. Some center on houses of worship. Others also maintain hospital, school, day-care, youth, old-age, store, recreation, meditation, media and other facilities – all as an overt part of their ministries. Thousands of institutions—from major faiths to unique store-front churches—employ hundreds of thousands of employees. Faced with inconsistent application of the ministerial exception, some employers must guess as to what duties courts will consider secular or religious, chilling their First Amendment rights.

A. The primary duties test hinders religious organizations' ability to direct their own ministries, and risks entangling courts in questions of religious doctrine.

The lower courts vary in their willingness to evaluate whether a particular activity is religious or secular, and thereby question a church's *bona fide* assertion that a particular function is central to its pastoral mission. Doing so necessarily draws courts into ecclesiastical disputes and poses substantial challenges for religious employers.

1. Assuming *arguendo* that an employee's duties can be classified objectively, the Sixth Circuit's

quantitative approach obliges an employer to ensure that any employee the church considers to be ministerial spends the appropriate percentage of his or her time performing court-approved religious activities. What percentage that may be—whether 51 percent or some other number—is not clear. *Cf. Alcazar*, 598 F.3d at 675-76 (rejecting arbitrary 51 percent requirement); *Coulee Catholic Schs.*, 768 N.W.2d at 882 (same).

This quantitative approach thus discriminates against faiths that favor ministry-through-service over more overt and recognizable "hard-nose proselytizing." See *Univ. of Great Falls* v. *NLRB*, 278 F.3d 1335, 1346 (D.C. Cir. 2002). The Salvation Army, for example, uses ordained members in many activities that could be deemed secular. See *Schleicher*, 518 F.3d 472 (administrator of Adult Rehabilitation Center operating five thrift shops and overseeing 20 to 40 employees); *McClure*, 460 F.2d 553 (secretary in the Territorial Headquarters' Public Relations Office). Embracing the approach below would require such organizations fundamentally to reassess how their ordained employees spend their time.

Organizations emphasizing service may have to amend their operations to accommodate this test. For example, a religious hospital may have to ensure that counselors spend the appropriate fraction of their time praying or engaged in other overtly sectarian activity rather than counseling patients and loved ones. See *Hollins* v. *Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007). Or perhaps a nun ministering as a nurse must raise her eyes to heaven and murmur a prayer before engaging in the physical care of patients in order to meet the necessary time

requirement, even if she considers her caregiving to be spiritual expression in itself.

Teaching ministries are particularly vulnerable to hours-counting precisely because they involve facially secular activities. Parochial schools minister to students not only through religious instruction, but by teaching secular subjects in a religious setting, sometimes by religious faculty. Limiting the exception to those who spend a majority of their time engaged in overtly religious activity will hinder religious schools' ability to do so.

2. This whole discussion begs the question whether employees' duties are even susceptible to objective classification as secular or religious in the first instance. Whether applied quantitatively or qualitatively, the primary duties approach assumes that courts can and should make such an assessment. But that inquiry risks the encroachment on religious freedoms that has animated courts to avoid doctrinal disputes generally. Indeed, a similar refusal to categorize activities as "religious" or "secular" was the basis for the Court's decision in *Presiding Bishop* v. *Amos*, 483 U.S. 327 (1987). There, the district court held that a gymnasium run by the Mormon Church could not fire a building engineer because "there [was] no clear connection between the primary function which the Gymnasium performs and the religious beliefs and tenets of the Mormon Church." *Id.* at 332. The Court reversed, rejecting any attempt to categorize activities as "religious" or "secular." *Id.* at 336.

> [I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might

> understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Ibid.

Likewise, in *University of Great Falls*, the D.C. Circuit chastised the NLRB for determining whether a professedly religious college or university was entitled to a religious exemption by "trolling through the beliefs of the University, making determinations about its religious mission." 278 F.3d at 1342. Indeed, "[j]udging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'" *Id.* at 1343 (citing *Smith*, 494 U.S. at 87).

So, too, is it improper for a court to inquire qualitatively whether particular duties are religious or secular for purposes of tallying up an employee's hours. The "potential for chilling religious activity" posed by a secular court imposing a secular-religious dichotomy is significant. *Amos*, 483 U.S. at 346 (Brennan, J., concurring in the judgment).

The decision below crossed this line. In parsing religious duties from secular, the court necessarily concluded—implicitly, if not explicitly—that in teaching anything other than religion, a "called" teacher acts as a purely secular agent. In so doing, the court gave minimal credit to the fact that Perich was engaged specifically as a commissioned minister, and was charged by the Church to "integrate faith into all subjects." Pet. 4, 3a-5a, 35a.

3. The potential for entanglement or impingement on free exercise are widespread, imposing a burden

on employers to guess how courts will classify particular duties.

Churches rely on a range of ordained and non-ordained employees to promote their religious mission. Courts have disagreed whether music directors are ministerial. Compare *Moersen*, 925 A.2d at 669 (organist not a minister), with *Assemany* v. *Archdiocese of Detroit*, 434 N.W.2d 233, 238 (Mich. Ct. App. 1988) (organist is a minister). Non-ordained employees may be essential to a church's pastoral message. See *Alicea-Hernandez*, 320 F.3d at 700 (non-ordained Hispanic Communications Manager is the "voice" of the church); *Skrzypczak*, 611 F.3d at 1240 (administrator heading the Department of Religious Formation).

Other important religious duties may similarly be carried out by lay employees. See *Shaliehsabou* v. *Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299, 303, 309 (4th Cir. 2004) (non-minister in charge of "guard[ing] against any violations of Jewish dietary law" claimed to serve a purely secular food-safety function); *Weissman* v. *Congregation Shaare Emeth*, 839 F. Supp. 680, 681 (E.D. Mo. 1993) (Jewish Temple administrator responsible for public relations and business management).

Less traditional religious organizations pose special difficulties. Quakers, for example, eschew hierarchy and leadership classifications. A federal district court thus found the Quaker representative to the United Nations to be secular, notwithstanding the assertion that the envoy's purpose was to give voice to Quaker values. See *Leaphart* v. *Am. Friends Serv. Comm.*, No. 07-4919, 2008 WL 4682626, at *2 (E.D. Pa. Oct. 22, 2008).

Judicial willingness to second-guess a religious institution's view of a position as religious poses tremendous difficulties for religious employers. Where a church must guess how a secular court will perceive a particular function that is integral to its pastoral ministry, but which has strong secular parallels, the church is chilled in its ability to arrange its affairs as it would for purely religious reasons. This is particularly the case for religions that are less widely understood. And, the mere threat of lawsuits over such issues may have the effect of coercing religious organizations to allow particular individuals to exercise religious responsibilities against the organization's will.

This difficulty is especially pronounced with regard to teaching, healing, and service ministries. Unsurprisingly, the question whether teaching is religious or secular has arisen repeatedly. See, *e.g.*, *Stately* v. *Indian Cmty. Sch. of Milwaukee, Inc.*, 351 F. Supp. 2d 858, 863, 867-69 (E.D. Wisc. 2004) (concluding that because "Indian culture" and "Indian religion" are inseparable, plaintiff was hired in a ministerial role); *Guinan*, 42 F. Supp. 2d at 852 (deciding "majority of the classes she taught regarded secular subjects"); *Redhead*, 440 F. Supp. 2d at 214 (comparing Bible study to "secular" subjects); *Himaka* v. *Buddhist Churches of Am.*, 917 F. Supp. 698, 709 (N.D. Cal. 1995) (applying exception to director of the Department of Buddhist Education because "[d]etermining whether the decision to eliminate funding...was 'legitimate' seems likely to draw this Court into judgments on matters of faith and doctrine, as well as matters of general church governance").

Faith-based organizations often serve communities in arguably secular ways. For example, a Jewish

non-profit whose mission is to serve elderly Jews "'in accordance with the precepts of Jewish law and customs, including the observance of dietary laws'" provides meals prepared by a "mashgiach," who is responsible for abiding by Jewish dietary law. *Shaliehsabou*, 363 F.3d at 301, 303 (quoting Hebrew Home's By-laws). Perhaps to non-believers, this is merely cooking, but the Fourth Circuit held otherwise, because a contrary ruling "would denigrate the importance of keeping kosher to Orthodox Judaism." *Id.* at 309.

Finally, religious humanitarian relief efforts require administrative duties similar to any aid organization. Those activities could be described as secular despite the fact that the "efforts flow from a profound sense of religious mission." *Spencer* v. *World Vision*, 619 F.3d 1109, 1126 (9th Cir. 2010) (finding World Vision is a religious organization under Title VII).

Charging courts to distinguish religious from secular forces employers to guess at the appropriate mix of duties or to artificially separate religious from secular duties, without regard to the nature of the church's ministry. It may also result in a chilling of religious organizations' ability to carry out their mission through their theologically-preferred manner or minister. Courts must not trench on religions' determination of who should be a minister, and how they shall minister. Nor should courts curtail religious organizations' ability to pursue sacred aims through seemingly secular means.

B. The ministerial exception potentially impacts tens of thousands of places of worship, faith-based institutions and employees.

The widespread significance of this issue is difficult to understate. Across the United States, scores of religious traditions express myriad religious practices and employ a wide range of religious and lay personnel.

At least ten religious traditions maintain one million or more self-reported adherents.[6] Christians alone comprise 227 national church bodies. National Council of the Churches of Christ in the U.S., 2010 Yearbook of American and Canadian Churches (Eileen W. Lindner ed., 2010). Some 335,000 religious congregations, served by more than 600,000 clergy dot the American landscape, including 12,000 non-Christian congregations.[7] The Catholic Church alone operates 17,958 parishes, and fields 39,993 priests, 57,544 nuns, 4,690 monks, and 16,649 permanent deacons.[8] The Presbyterian Church (USA) reports 10,657 congregations comprising

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[6] Protestant, Catholic, Mormon, Jehovah's Witness, Orthodox Christian, Jewish, Buddhist, Muslim, and Hindu. *See* Pew Forum on Religion & Public Life, U.S. Religious Landscape Survey, *available at* http://religions.pewforum.org/pdf/affiliations-all-traditions.pdf (last visited Nov. 8, 2010) (listing all religions with greater than 0.4% of the American population as self-reporting adherents).

[7] Hartford Institute For Religion Research, Fast Facts, *available at* http://hirr.hartsem.edu/research/fastfacts/fast_facts.html (last visited Nov. 8, 2010).

[8] Center for Applied Research in the Apostolate, Frequently Requested Church Statistics, *available at* http://cara.georgetown.edu/CARAServices/requestedchurchstats.html (last visited Nov. 8, 2010).

2,077,138 reported members.[9] And the Seventh-day Adventist Church employs 74,532 individuals in its North American Division, including 2,753 ordained pastoral employees, 572 licensed pastoral employees, 1,957 non-ordained administrative employees, and 96 literature evangelists.[10]

In 2007-2008, some 22,910 religious schools educated over four million students and employed 329,941 full-time equivalent teachers in the United States.[11] The Catholic Church alone operates 5,889 elementary schools and 1,205 secondary schools serving over 2.1 million students.[12] These employ 154,316 professional staff, of whom the vast majority, more than 96 percent, are now lay.[13]

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[9] *See* Comparative Statistics 2009, Table 1, *available at* http://www.pcusa.org/media/uploads/research/pdfs/2009_table_1.pdf (last visited Nov. 16, 2010).

[10] *See* Conference of Seventh-day Adventists, 146th Annual Statistical Report at 6 (2008), *available at* http://www.adventistarchives.org/docs/ASR/ASR2008.pdf (last visited Nov. 15, 2010).

[11] *See* United States Dep't of Ed., Nat'l Cent. for Educ. Stats., Private School Universe Survey (PSS), Table 2 (2007-2008) *available at* http://nces.ed.gov/surveys/pss/tables/table_2008_02.asp (last visited Nov. 8, 2010).

[12] Center for Applied Research in the Apostolate, Frequently Requested Church Statistics, *available at* http://cara.georgetown.edu/CARAServices/requestedchurchstats.html (last visited Nov. 8, 2010) (citing statistics from the National Catholic Educational Association).

[13] *See* United States Catholic Elementary and Secondary Schools 2009-2010, Annual Statistical Report on Schools, Enrollment, and Staffing, *available at* http://www.ncea.org/news/AnnualDataReport.asp (last visited Nov. 8, 2010).

During 2005-2006, some 14,445 non-Catholic religious schools educated 1,884,616 students.[14] These included *inter alia* 4,338 non-denominational Christian schools, 2,511 Baptist schools, 1,632 Lutheran schools, 883 Seventh-day Adventist schools, 853 Jewish schools, and 202 Islamic schools.[15]

Many faiths minister to the sick by operating hospitals. For example, the Seventh-day Adventist Church operates nearly 60 hospitals in North America, employing 7,879 Seventh-day Adventist employees alongside 46,025 other employees.[16] During 2009, 562 Catholic hospitals treated over 85 million patients.[17]

Many faiths also minister through social services. The Salvation Army, Catholic Charities, Hillel, and Islamic Relief USA regularly provide spiritual and charitable support. To pick just one, the Salvation Army runs 1,375 family stores, 340 community centers, 120 child day care centers, 266 senior citizen

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[14] *See* United States Dep't of Ed., Nat'l Cent. for Educ. Stats., Private School Universe Survey (PSS) (2005-2006) *available at* http://nces.ed.gov/surveys/pss/tables/table_whs_02.asp (last visited Nov. 15, 2010).

[15] *See id.*, *available at* http://nces.ed.gov/surveys/pss/tables/table_whs_03.asp.

[16] *See* General Conference of Seventh-day Adventists, 146th Annual Statistical Report at 65-66 (2008), *available at* http://www.adventistarchives.org/docs/ASR/ASR2008.pdf (last visited Nov. 15, 2010). The Seventh-day Adventist Church separately operates 41 nursing homes and retirement centers in North America, employing 4,242 individuals. *Id.* at 68.

[17] *See* United States Conference of Catholic Bishops, The Catholic Church in the United States At A Glance, *available at* http://www.usccb.org/comm/catholic-church-statistics.shtml (citing The Official Catholic Directory 2009, P.J. Kennedy & Sons, New Providence, NJ. 2006).

centers, 568 group homes, 45 camps, and 4 training colleges.[18] These employ 3,557 officers, 283 cadets, 107,393 soldiers, 400,055 members, 60,117 employees, and over 3.4 million volunteers. *Id.*

These statistics clearly illustrate the widespread importance of the question presented, as religious employers of all faiths must face the inconsistent application of the various standards currently in use across the circuits and states. Because the petition presents a clear dispute deserving of this Court's resolution on an issue of widespread national importance, the petition ought to be granted.

CONCLUSION

For these reasons, and those stated by petitioner, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[18] *See* Salvation Army, 2010 Annual Report, at 22 (2010), *available at* http://annualreport.salvationarmyusa.org/_pdf/2010_AnnualReport.pdf (last visited Nov. 15, 2010).

APPENDIX

Loma Linda University is a Seventh-day Adventist educational health-sciences institution with more than 4,000 students located in Southern California. Eight schools comprise the University organization. More than 55 programs are offered by the schools of Allied Health Professions, Dentistry, Medicine, Nursing, Pharmacy, Public Health, Religion and Science and Technology. Curricula offered range from certificates of completion and associate in science degrees to doctor of philosophy and professional doctoral degrees. Loma Linda has an interest in ensuring religious liberty is not hampered by a narrow ministerial exception.

The General Council on Finance and Administration of The United Methodist Church, Inc., ("GCFA") is an Illinois corporation having its primary place of business in Nashville, Tennessee. GCFA is the financial and administrative arm of The United Methodist Church. GCFA is also charged with protecting the legal interests and rights of The United Methodist Church. The United Methodist Church is a religious denomination with approximately thirteen million members worldwide. Through its various agencies, it performs mission work in over 150 countries. The United Methodist Church is one of the largest religious denominations in the United States. It has approximately 33,000 local churches and nearly eight million members in the United States.

The **Church State Council** is a religious liberty ministry of the Pacific Union Conference of Seventh-day Adventists, and is the oldest public policy organization in the southwestern United States

devoted exclusively to issues of liberty of conscience and religion and the separation of church and state. The Church State Council stands in the Protestant and Enlightenment traditions of protesting the combination of church and state to define or promote theological "truth," or to punish "error." The Church State Council asks nothing of the state except that it protects religious freedom for all peaceful people of faith. The Church State Council is dedicated to encouraging persons of all faiths or no faith to be diligent to protect the freedom to think and believe according to the dictates of individual conscience, and the institutional separation of church and state that is essential for preserving religious freedom.

Church Communities International is an international communal movement of families and singles who seek to put into action Christ's command to love God and neighbor. Like the first Christians described in Acts 2 and 4, members are called to a way of life in which all are of one heart and soul, no one possesses anything, and everything is shared in common. Most members live in rural communities of 200-300 people that function as small villages. As part of the living proclamation of their faith, members contribute to the upkeep of the community through daily work. No one is paid for their work as each community shares all property, and working together is an expression of the members' commitment to serve Jesus Christ and one another.

The **Association of Christian Schools International** ("ACSI") is a nonprofit, non-denominational, religious association providing support services to more than 4,100 Christian preschools, and elementary and secondary schools in the United States. Services are also provided to more than 160 colleges and universities. ACSI has eleven

offices in the United States. ACSI's headquarters and international office is located in Colorado Springs, Colorado.

Adventist Health is a not-for-profit religious corporation, which operates healthcare facilities throughout California, Hawaii, Oregon, and Washington. The stated mission of Adventist Health is to share God's love by providing physical, mental and spiritual healing as part of the healthcare heritage of the Seventh-day Adventist Church. The system includes 17 hospitals with more than 2,500 beds, approximately 18,600 employees, numerous clinics and outpatient facilities, the largest system of rural health clinics in California with additional sites in Oregon and Washington, 14 home care agencies and four joint-venture retirement centers. As a faith-based, non-profit organization, Adventist Health is impacted by the scope of the ministerial exception

JOINT APPENDIX

Supreme Court, U.S.
FILED
JUN 13 2011
OFFICE OF THE CLERK

No. 10-553

IN THE
Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX

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CERTIORARI GRANTED MARCH 28, 2011

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U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN (DETROIT)

Date Filed 09/28/2007
Civil Docket for Case #: 2:07-cv-14124-PJD-SDP

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Plaintiff

v.

CHERYL PERICH
Intervenor Plaintiff

v.

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL
Defendant

RELEVANT DOCKET ENTRIES

DATE	#	DOCKET TEXT
09/28/2007	1	**COMPLAINT filed by Equal Employment Opportunity Commission against Hosanna-Tabor Evangelical Lutheran Church and School (THal) (Entered: 10/01/2007)**
10/29/2007	2	**ANSWER to Complaint with Affirmative Defenses *with Reliance on Jury Demand* by Hosanna-Tabor Evangelical Lutheran Church and School. (Ware, Deano) (Entered: 10/29/2007)**

* * *

DATE	#	DOCKET TEXT
04/10/2008	14	ORDER granting 9 Motion to Intervene filed by Cheryl Perich. Signed by District Judge Patrick J Duggan. (MOre) (Entered: 04/10/2008)
04/10/2008	15	INTERVENOR COMPLAINT filed by Cheryl Perich against Hosanna-Tabor Evangelical Lutheran Church and School (Roach, James) (Entered: 04/10/2008)
04/19/2008	16	ANSWER to Intervenor Complaint with Affirmative Defenses with Jury Demand by Hosanna-Tabor Evangelical Lutheran Church and School (Ware, Deano) (Entered: 04/19/2008)
		* * *
07/15/2008	22	MOTION for Summary Judgment by Hosanna-Tabor Evangelical Lutheran Church and School. (Attachments: # 1 Index of Exhibits, # 2 Exhibit A - Letter of Feb 22 2005, #3 Exhibit B - Letter2 of Feb 22 2005, # 4 Exhibit C - Letter of Mar 19 2005, # 5 Exhibit D - Letter of Apr 11 2005, # 6 Exhibit F - EEOC Complaint, # 7 Exhibit F - Perich Complaint, # 8 Exhibit G - Articles of Incorporation, # 9 Exhibit H - Feb 29 2000 Colloquy Letter, # 10 Exhibit I - Diploma of Vocation, Minister, # 11 Exhibit J - 2002 Lutheran Annual, # 12 Exhibit K - Teachers Contract, # 13 Exhibit L - Supplement to Diploma of Vocation,

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		# 14 Exhibit M - Perich Personnel Info Form # 15 Exhibit N - Excerpt of By Laws of Synod, # 16 Exhibit O - Synod Dispute Resolution Policy) (Ware, Deano) (Entered: 07/15/2008)
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07/15/2008	24	MOTION for Summary Judgment by Cheryl Perich. (Attachments: # 1 Index of Exhibits Index of Exhibits, # 2 Exhibit Ex. 1 Letter from Scott Salo dated March 19, 2005, # 3 Exhibit Ex. 2 - Deposition transcript foe Jim Pranschke, # 4 Exhibit Ex. 3 - Deposition transcript for Bruce Braun, # 5 Exhibit Ex. 4 - Affidavit of Cheryl Perich, # 6 Exhibit Ex. 5 - Deposition transcript for Stacy Hoeft, # 7 Exhibit Ex. 6 - Email from Stacy Hoeft, # 8 Exhibit Ex. 7 - Email from Cheryl Perich, # 9 Exhibit Ex. 8 - Email from Stacy Hoeft, # 10 Exhibit Ex. 9 - Emails between Stacy Hoeft and Cheryl Perich, # 11 Exhibit Ex. 10 - Email from Stacy Hoeft, # 12 Exhibit Ex. 11 - Email from Cheryl Perich, # 13 Exhibit Ex. 12 - Email from Stacy Hoeft, # 14 Exhibit Ex. 13 - Meeting Minutes, # 15 Exhibit Ex. 14 - Email from Stacy Hoeft, # 16 Exhibit Ex. 15 - Return to Work Note, # 17 Exhibit Ex. 16 - Deposition transcript for Sheila Simpson. # 18 Exhibit Ex. 17. Email from Cheryl Perich, # 19 Ex. 18 - Employee Handbook,# 20 Exhibit Ex.

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07/16/2008	27	NOTICE of Joinder/Concurrence in 24 MOTION for Summary Judgment filed by Cheryl Perich by Equal Employment Opportunity Commission (Weaver, Omar) (Entered: 07/16/2008)

DATE	#	DOCKET TEXT
07/22/2008	28	REPLY to Response re 17 MOTION to Quash *Subpoenas* filed by Cheryl Perich. (Attachments: # 1 Index of Exhibits Index of Exhibits, # 2 Exhibit 1 - *Johnson v. Guards Mark Security*, 2007 WL 10235309 (N.D. Ohio 2007)) (Roach, James) (Entered: 07/22/2008)
07/24/2008	29	STATEMENT of Resolved and Unresolved Issues by Cheryl Perich (Roach. James) (Entered: 07/24/2008)
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DATE	#	DOCKET TEXT
08/05/2008	35	RESPONSE to 22 MOTION for Summary Judgment of Hosanna-Tabor filed by Equal Employment Opportunity Commission. (Weaver, Omar) (Entered: 08/05/2008)
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08/13/2008	42	REPLY to Response re 22 MOTION for Summary Judgment filed by Hosanna-Tabor Evangelical Lutheran Church and School. (Ware, Deano) (Entered: 08/13/2008)
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		* * *

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		* * *
09/22/2008	48	**STATEMENT of Resolved and Unresolved Issues by Hosanna-Tabor Evangelical Lutheran Church and School (Ware, Deano) (Entered: 09/22/2008)**
09/25/2008		**Minute Entry - Motion Hearing held on 9/25/2008 re 22 MOTION for Summary Judgment filed by Hosanna-Tabor Evangelical Lutheran Church and School, 24 MOTION for Summary Judgment filed by Cheryl Perich, 25 MOTION for Partial Summary Judgment** ***on Intervening Plaintiff Complaint*** **filed by Hosanna-Tabor Evangelical Lutheran Church and School before District Judge Patrick J Duggan. Disposition: Taken Under Advisement (Court Reporter Jodi Matthews) (MOre) (Entered: 09/25/2008)**
		* * *

DATE	#	DOCKET TEXT
10/23/2008	50	OPINION AND ORDER granting 22 Motion for Summary Judgment; denying 24 Motion for Summary Judgment; granting 25 Motion for Partial Summary Judgment. Signed by District Judge Patrick J Duggan. (MOre) (Entered: 10/23/2008)
10/23/2008	51	JUDGMENT Signed by District Judge Patrick J Duggan. (MOre) (Entered: 10/3/2008)
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12/03/2008	58	OPINION AND ORDER denying 52 Motion for Attorney Fees; denying 53 Motion for Reconsideration; denying 54 Motion for Reconsideration. Signed by District Judge Patrick J Duggan. (MOre) (Entered: 12/03/2008)
1/30/2009	59	NOTICE OF APPEAL by Equal Employment Opportunity Commission re 50 Order on Motion for Summary Judgment,, Order on Motion for Partial Summary Judgment, 58 Order on Motion for Attorney Fees, Order on

DATE	#	DOCKET TEXT
		Motion for Reconsideration, 51 Judgment. Fee Status: No Fee Paid. (Weaver, Omar) (Entered: 01/30/2009)
01/30/2009	60	NOTICE OF APPEAL by Cheryl Perich re 50 Order on Motion for Summary Judgment,, Order on Motion for Partial Summary Judgment, 58 Order on Motion for Attorney Fees, Order on Motion for Reconsideration, 51 Judgment. Receipt No: 0645000000001853828 - Fee: $455 - Fee Status: Fee Paid. (Roach, James) (Entered: 01/30/2009)
		* * *
03/09/2010	63	JUDGMENT from U.S. Court of Appeals - Sixth Circuit - Disposition: Ordered that the order of the District Court entering summary judgment on behalf of Defendant is vacated and the case is remanded for further proceedings. [Appeal Case Number 09-1134; 09-1135) (JCha) (Entered: 03/09/2010)
12/28/2010	78	STIPULATION AND ORDER TO STAY proceedings pending disposition of Petition for Writ of Certiorari. Signed by District Judge Patrick J Duggan. (DWor) (Entered: 12/28/2010)

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Court of Appeals
Consolidated Docket # 09-1134, 09-1135
Docketed: 02/03/2009
Termed: 03/09/2010

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Plaintiff-Appellant

and

CHERYL PERICH
Plaintiff

v.

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL
Defendant-Appellee

RELEVANT DOCKET ENTRIES

DATE	DOCKET TEXT
	* * *
02/03/2009	Civil Case Docketed. Notice filed by Appellant EEOC. Transcript needed: y. (NB)
	* * *
03/19/2009	Appellant BRIEF filed by Ms. Dori Kay Bernstein for EEOC. Certificate of Service: 03/19/2009. Argument Request: requested. [09-1134, 09-1135] (DKB)

DATE	DOCKET TEXT
	* * *
03/25/2009	APPELLANT BRIEF filed by Mr. James E. Roach for Cheryl Perich. Certificate of Service: 03/25/2009. Argument Request: requested. [09-1135, 09-1134] (JER)
04/24/2009	APPELLEE BRIEF filed by Mr. Deano C. Ware for Hosanna-Tabor Evangelical Lutheran Church and School in 09-1134, 09-1135. Certificate of Service 04/24/2009. Argument Request: requested. [09-1134, 09-1135] (DCW)
05/06/2009	REPLY BRIEF lied by Attorney Ms. Dori Kay Bernstein for Appellant EEOC. Certificate of Service: 05/06/2009 [09-1134, 09-1135] (DKB)
05/08/2009	REPLY BRIEF filed by Attorney Mr. James E. Roach for Appellant Cheryl Perich Certificate of Service: 05/08/2009. [09-1134, 09-1135] (JER)
	* * *
10/06/2009	CAUSE ARGUED by Ms. Dori Kay Bernstein for Appellant EEOC and Mr. Deano C. Ware for Appellee Hosanna-Tabor Evangelical Lutheran Church in School in 09-1134, Mr. James E. Roach for Appellant Cheryl Perich and Mr. Deano C. Ware for Appellee Hosanna-Tabor Evangelical Lutheran Church and School in 09-

DATE	DOCKET TEXT
	1135 before Judges Guy, Clay and White. [09-1134, 09-1135] (KSC)
03/09/2010	OPINION and JUDGMENT filed: VACATED sod REMANDED, decision for publication pursuant to local rule 206. Ralph B. Guy. Jr.. Eric L. Clay (AUTHORING), Helene N. White (CONCURRING), Circuit Judges. [09-1134, 09-1135] (LKM)
	* * *
06/07/2010	RESPONSE to petition for en banc rehearing, [4172224-2], previously filed by Mr. James W. Erwin for Hosanna-Tabor Evangelical Lutheran church and School and Ms. Sherri C. Strand for Hosanna-Tabor Evangelical Lutheran Church and School in 09-1134, 09-1135. Response filed by Ms. Dori Kay Bernstein for EEOC. Certificate of service: 06/07/2010. [09-1134, 09-1135] (DKB)
06/07/2010	RESPONSE to petition for en banc rehearing, [4172224-2], previously filed by My. James W. Erwin for Hosanna-Tabor Evangelical Lutheran Church and School and Ms. Sherri C. Strand for Hosanna-Tabor Evangelical Lutheran Church and School in 09-1135, 09-1134. Response filed by Mr. James E. Roach for Cheryl Perich. Certificate of service: 06/07/2010. [09-1135, 09-1134] (JER)

DATE	DOCKET TEXT
06/24/2010	ORDER filed denying petition for en banc rehearing [4172224-2], filed by Mr. James W. Erwin and Ms. Sherri C. Strand for Hosanna-Tabor Evangelical Lutheran Church and School. Ralph B. Guy, Jr., Eric L. Clay, Helene N. White Circuit Judges. [09-1134, 09-1135] (BLH)
07/06/2010	MANDATE ISSUED with no costs taxed. [09-1135, 09-1134] (NB)
10/28/2010	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellee Hosanna-Tabor Evangelical Lutheran Church and School in 09-1134, 09-1135. Supreme. Court Case No. 10-553, 10/22/2010. [09-1134, 09-1135] (SWH)
3/30/2011	U.S. Supreme Court letter filed granting certiorari petition [4273558-2] filed by Hosanna-Tabor Evangelical Lutheran Church and School in 09-1134. The motions of International Mission Board of the Southern Baptist Convention, Religious Organizations and Institutions, and Christian Reformed Church in North America for leave to file briefs as amici curiae are granted. Supreme Court Case No: 10-553, 03/28/2011. [09-1134, 09-1135] (SWH)

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed 09/28/07]

Case: 2:07-cv-14124
Assigned To: Duggan, Patrick J
Referral Judge: Pepe, Steven D
Filed: 09-28-2007 At 03:13 PM
CMP: EEOC V. HOSANNA TABOR
EVAN LUTHERAN (NH)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

v.

HOSANNA-TABOR EVANGELICAL
LUTHERAN CHURCH AND SCHOOL,
Defendant.

COMPLAINT AND JURY TRIAL DEMAND

NATURE OF THE ACTION

This is an action under Title I of the Americans with Disabilities Act of 1990 ("ADA") and Title I of the Civil Rights Act of 1991 to correct unlawful employment practices on the basis of retaliation and to make whole Cheryl Perich ("Perich"). The Equal Employment Opportunity Commission ("Commission") alleges that the Defendant, Hosanna-Tabor Evangelical Lutheran Church and School discharged Perich in retaliation for threatening to file an ADA lawsuit.

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343 and 1345. This action is authorized and instituted pursuant to Section 107(a) of The Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12117(a), which incorporates by reference Sections 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e-5(f)(1) and (3), and pursuant to Section 102 of the Civil Rights Act of 1991, as amended, 42 U.S.C. § 1981a.

2. The employment practices alleged to be unlawful were committed within the jurisdiction of the United States District Court for the Eastern District of Michigan, Southern Division.

PARTIES

3. Plaintiff, Equal Employment Opportunity Commission (the "Commission"), is an agency of the United States of America charged with the administration, interpretation, and enforcement of Title I of the ADA and is expressly authorized to bring this action by Sections 107(a) and 503(c) of the ADA, 42 U.S.C. §§ 12117(a) and 12203(c), which incorporates by reference Sections 706(f)(1) and (3) of Title VII, 42 U.S.C. § 2000e-5(f)(1) and (3).

4. At all relevant times, the Defendant Hosanna-Tabor Evangelical Lutheran Church and School (the "Employer") has been a Michigan corporation doing business in the State of Michigan and City of Redford, and has continuously had at least (15) employees.

5. At all relevant times the Defendant Employer has continuously been an employer engaged in an industry affecting commerce under Section 101(5) of the ADA, 42 U.S.C. § 12111(5), and Section 101(7) of the ADA, 42 U.S.C. § 12111(7), which incorporates by reference Sections 701(g) and (h) of Title VII, 42 U.S.C. § 2000e(g) and (h).

6. At all relevant times, the Defendant Employer has been a covered entity under Section 101(2) of the ADA, 42 U.S.C. § 12111(2).

STATEMENT OF CLAIMS

7. More than thirty (30) days prior to the institution of this lawsuit, Perich filed a charge with the Commission alleging violations of Title I of the ADA by the Defendant Employer. All conditions precedent to the institution of this lawsuit have been fulfilled.

8. Since at least February 22, 2005, the Defendant Employer has engaged in unlawful employment practices at its Redford, Michigan facility in violation of Section 503(a) of the ADA, 42 U.S.C. 12203(a). These practices include terminating Perich's employment in retaliation for threatening to file an ADA lawsuit against Defendant Employer.

9. The effect of the practices complained of in paragraph 8 above has been to deprive Perich of equal employment opportunities and otherwise adversely affect her status as an employee because she asserted her rights under the ADA.

10. The unlawful employment practices complained of in paragraph 8 were intentional.

11. The unlawful employment practices complained of in paragraph 8 were done with malice or

with reckless indifference to the federally protected rights of Perich.

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully requests that this Court:

A. Grant a permanent injunction enjoining Defendant Employer, its officers, successors, assigns, and all persons in active concert or participation with it from engaging in retaliation and any other employment practice which discriminates on the basis of disability.

B. Order Defendant Employer to institute and carryout policies, practices, and programs which provide equal employment opportunities for qualified individuals with disabilities, and which eradicate the effects of its past and present unlawful employment practices.

C. Order Defendant Employer to make whole Perich by providing her with appropriate lost earnings and benefits, with prejudgement interest, in amounts to be proven at trial, and other affirmative relief necessary to eradicate the effects of its unlawful employment practices including, but not limited to, reinstating Perich to the position from which she was terminated with pay and benefits equal to that which she would have attained had she not been terminated, or providing Perich with appropriate front pay in lieu of reinstatement.

D. Order Defendant to make whole Perich by providing compensation for past and future pecuniary losses resulting from the unlawful employment practices described in paragraph 8 above, in amounts to be determined at trial.

E. Order Defendant Employer to make whole Perich by providing compensation for past and future nonpecuniary losses resulting from the unlawful practices complained of in paragraph 8 above, in amounts to be determined at trial.

F. Order Defendant Employer to pay Perich punitive damages for its malicious and reckless conduct, as described in paragraph 8 above, in amounts to be determined at trial.

G. Grant such further relief as the Court deems necessary and proper in the public interest.

H. Award the Commission its costs of this action.

JURY TRIAL DEMAND

The Commission requests a jury trial on all questions of fact raised by its complaint.

Dated: September 28, 2007

Respectfully submitted

/s/ DEBORAH M. BARNO
DEBORAH M. BARNO (P44525)
Supervisory Trial Attorney

/s/ OMAR WEAVER
OMAR WEAVER (P58861)
Trial Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
DETROIT FIELD OFFICE
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 865
Detroit, MI 48226
(313) 226-3407

Case 2:07-cv-14124-CIVIL COVER SHEET Document 1 Filed 09/28/07 Page 6 of 7

...nt and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as ...d of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose ...ll docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. PLAINTIFFS
...UAL EMPLOYMENT OPPORTUNITY COMMISSION

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)
Omar Weaver (P52861), Trial Attorney
Equal Employment Opportunity Commission
477 Michigan Avenue, Room 865, Detroit, MI 48226 (313) 226-3407

DEFENDANTS
HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH

County of Residence of First Listed Defendant Wayne
(IN U.S. PLAINTIFF CASES ONLY)

Case: 2:07-cv-14124
Assigned To: Duggan, Patrick J
Referral Judge: Pepe, Steven D
Filed: 09-28-2007 At 03:13 PM
CMP: EEOC V. HOSANNA TABOR EVAN LUT
HERAN (NH)

MI

II. BASIS OF JURISDICTION (Select One Box Only)

- ☑ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CI... (For Diversity Cases Only) (Place an X in One Box for Plaintiff and One Box for Defendant)

	PTF	DFT		PTF	DFT
Citizen of This State	☐ 1	☐ 1	Incorporated or Principal Place of Business in This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business in Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Select One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 151 Medicare Act ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans) ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholders' Suits ☐ 190 Other Contract ☐ 195 Contract Product Liability ☐ 196 Franchise	PERSONAL INJURY ☐ 310 Airplane ☐ 315 Airplane Product Liability ☐ 320 Assault, Libel & Slander ☐ 330 Federal Employers' Liability ☐ 340 Marine ☐ 345 Marine Product Liability ☐ 350 Motor Vehicle ☐ 355 Motor Vehicle Product Liability ☐ 360 Other Personal Injury PERSONAL INJURY ☐ 362 Personal Injury - Med. Malpractice ☐ 365 Personal Injury - Product Liability ☐ 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY ☐ 370 Other Fraud ☐ 371 Truth in Lending ☐ 380 Other Personal Property Damage ☐ 385 Property Damage Product Liability	☐ 610 Agriculture ☐ 620 Other Food & Drug ☐ 625 Drug Related Seizure of Property 21 USC 881 ☐ 630 Liquor Laws ☐ 640 R.R. & Truck ☐ 650 Airline Regs. ☐ 660 Occupational Safety/Health ☐ 690 Other LABOR ☐ 710 Fair Labor Standards Act ☐ 720 Labor/Mgmt. Relations ☐ 730 Labor/Mgmt. Reporting & Disclosure Act ☐ 740 Railway Labor Act ☐ 790 Other Labor Litigation ☐ 791 Empl. Ret. Inc. Security Act	☐ 422 Appeal 28 USC 158 ☐ 423 Withdrawal 28 USC 157 PROPERTY RIGHTS ☐ 820 Copyrights ☐ 830 Patent ☐ 840 Trademark SOCIAL SECURITY ☐ 861 HIA (1395ff) ☐ 862 Black Lung (923) ☐ 863 DIWC/DIWW (405(g)) ☐ 864 SSID Title XVI ☐ 865 RSI (405(g)) FEDERAL TAX SUITS ☐ 870 Taxes (U.S. Plaintiff or Defendant) ☐ 871 IRS—Third Party 26 USC 7609	☐ 400 State Reapportionment ☐ 410 Antitrust ☐ 430 Banks and Banking ☐ 450 Commerce ☐ 460 Deportation ☐ 470 Racketeer Influenced and Corrupt Organizations ☐ 480 Consumer Credit ☐ 490 Cable/Sat TV ☐ 810 Selective Service ☐ 850 Securities/Commodities Exchange ☐ 875 Customer Challenge 12 USC 3410 ☐ 890 Other Statutory Actions ☐ 891 Agricultural Acts ☐ 892 Economic Stabilization Act ☐ 893 Environmental Matters ☐ 894 Energy Allocation Act ☐ 895 Freedom of Information Act ☐ 900 Appeal of Fee Determination Under Equal Access to Justice ☐ 950 Constitutionality of State Statutes
REAL PROPERTY ☐ 210 Land Condemnation ☐ 220 Foreclosure ☐ 230 Rent Lease & Ejectment ☐ 240 Torts to Land ☐ 245 Tort Product Liability ☐ 290 All Other Real Property	CIVIL RIGHTS ☐ 441 Voting ☐ 442 Employment ☐ 443 Housing/ Accommodations ☐ 444 Welfare ☐ 445 Amer. w/Disabilities - Employment ☐ 446 Amer. w/Disabilities - Other ☐ 440 Other Civil Rights	PRISONER PETITIONS ☐ 510 Motions to Vacate Sentence Habeas Corpus: ☐ 530 General ☐ 535 Death Penalty ☐ 540 Mandamus & Other ☐ 550 Civil Rights ☐ 555 Prison Conditions		

V. ORIGIN (Select One Box Only)

- ☑ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
Title I of the American with Disabilities Act of 1990 and Title of the Civil Rights Act of 1991
Brief description of cause:
To correct unlawful employment practices on the basis of disability

VII. REQUESTED IN COMPLAINT:
☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23
DEMAND $
CHECK YES only if demanded in complaint:
JURY DEMAND: ☑ Yes ☐ No

VIII. RELATED CASE(S) IF ANY (See instructions)
JUDGE _____ DOCKET NUMBER _____

DATE
September 28, 2007

SIGNATURE OF ATTORNEY OF RECORD
Omar Weaver

FOR OFFICE USE ONLY
RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

19

PURSUANT TO LOCAL RULE 83.11

1. Is this a case that has been previously dismissed?

☐ Yes

☑ No

If yes, give the following information:

Court: _____

Case No.: _____

Judge: _____

2. Other than stated above, are there any pending or previously discontinued or dismissed companion cases in this or any other court, including state court? (Companion cases are matters in which it appears substantially similar evidence will be offered or the same or related parties are present and the cases arise out of the same transaction or occurrence.)

☐ Yes

☑ No

If yes, give the following information:

Court: _____

Case No.: _____

Judge: _____

Notes: _____

_____

_____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed 10/29/07]

Hon. Patrick J. Duggan
Case No. 2:07-cv-14124

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

v.

HOSANNA TABOR EVANGELICAL
LUTHERAN CHURCH AND SCHOOL,
Defendant.

Omar Weaver
Equal Employment
Opportunity Commission
Attorneys for Plaintiff
865 Patrick V. McNamara
Building
477 Michigan Avenue
(313) 226-3407

Deano C. Ware, P.C.
Deano C. Ware (P65421)
Attorneys for Defendant
P.O. Box 40162
Redford, Michigan 48240
(313) 541-8433

DEFENDANT HOSANNA TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL'S ANSWER AND NOTICE OF AFFIRMATIVE DEFENSES AND RELIANCE ON JURY DEMAND AND CERTIFICATE OF SERVICE

NOW COMES, Deano C. Ware, counsel for Defendant Hosanna Tabor Evangelical Lutheran Church and School ("Hosanna Tabor") and states as follows for its Answer and Affirmative Defenses to Plaintiff's complaint saving and reserving unto itself all right

and manner of benefit and exception to the many insufficiencies and inaccuracies in the Plaintiff's Complaint and for answer thereto, or to so much thereof as it is advised it is necessary or material for to answer says:

NATURE OF ACTION

Defendant neither admits nor denies that this is an action governed under Title I of the Americans with Disabilities Act of 1990 ("ADA") as Defendant leaves Plaintiff to its proofs that the complainant Cheryl Perich ("Perich") has a disability as defined under the act.

JURISDICTION AND VENUE

1. Denied. Defendant denies that this court has jurisdiction over this matter as Defendant denies that the complaint Perich has a "disability" as that term is defined under Title I of the Americans with Disabilities Act of 1990 ("ADA"). Defendant further denies that this court has jurisdiction over this matter because Defendant neither admits nor denies that at all times relevant to this complaint, Defendant Hosanna Tabor was an employer covered under the ADA. Defendant further denies that this court has jurisdiction over this matter as Plaintiff has failed to attempt to conciliate this matter with Defendant in a good faith manner.

2. Admitted in part. Defendant only admits that the practices at issue in this complaint occurred within the jurisdiction of the United States District Court for the Eastern District of Michigan.

3. Admitted in part. Defendant denies that Plaintiff is expressly authorized to bring this action as Defendant denies that this action is governed by the ADA.

4. Neither admitted nor denied as Defendant is without sufficient information at this time to admit or deny that "at all relevant times" it has continuously had at least 15 employees. Defendant further denies that it is a Michigan corporation and states by way of further answer that Defendant is a Michigan Ecclesiastical corporation.

5. Neither admitted or denied as Defendant is without sufficient information at this time to admit or deny that "at all relevant times" it has engaged in an industry affecting commerce.

6. Neither admitted nor denied as Defendant is without sufficient information at this time to admit or deny that "at all relevant times" it has been a covered entity under Section 101(2) of the ADA.

STATEMENT OF CLAIMS

7. Denied as untrue. Defendant denies that all conditions precedent to the institution of this lawsuit have been fulfilled. Plaintiff has failed to attempt to conciliate this matter in good faith as required by the Act. Further Plaintiff has failed to prosecute this matter in a timely manner as required by the Act. Plaintiff has failed to bring this matter in the time allowed by the Act.

8. Denied as untrue. Defendant denies that it has engaged in any unlawful employment practices. Defendant denies that it terminated Perich's employment in retaliation for threatening to file an ADA lawsuit.

9. Denied as untrue.

10. Denied as untrue.

11. Denied as untrue.

PRAYER FOR RELIEF

WHEREFORE, Defendant respectfully request that Plaintiff's prayer for relief be denied and complaint be dismissed with prejudice and that this court enter order awarding Defendant its costs and attorney fees incurred in the defense of this matter.

Respectfully submitted,

DEANO C. WARE, P.C.

/s/ Deano C. Ware
Deano C. Ware (P65421)
P.O. Box 40162
Redford, Michigan 48240
(313) 541-8433
attorneyware@msn.com

Dated: October 29, 2007

AFFIRMATIVE DEFENSES

NOW COMES the Defendant, Hosanna Tabor Evangelical Lutheran Church and School, by and through its attorneys, Deano C. Ware, P.C., and by way of Affirmative Defenses, states that it will rely upon and insist in its defense and demand a reply hereto:

1. Plaintiff's Complaint fails to state a claim upon which relief may be granted.
2. Plaintiff's claims are barred by statute.
3. Plaintiff's claims are barred by statute of limitations.
4. Plaintiff's claims are barred by a statute of repose as provided in the ADA.
5. Lack of Jurisdiction. This court lacks subject matter jurisdiction over this matter as Plaintiff's claims are not governed by the ADA.
6. Laches. Plaintiff's claims are barred in whole or part by the doctrine of laches.
7. Defendant's actions are covered in whole or part by the separation clause of the United States Constitution and ecclesiastical in nature such that this court is barred from ruling on them.
8. Defendant reserves the right to amend its affirmative defenses as further defenses become known through the course of discovery.

Respectfully submitted,

DEANO C. WARE, P.C.

/s/ Deano C. Ware
Deano C. Ware (P65421)
P.O. Box 40162
Redford, Michigan 48240
(313) 541-8433
attorneyware@msn.com

Dated: October 29, 2007

RELIANCE UPON JURY DEMAND

NOW COMES the Defendant, Hosanna Tabor Evangelical Lutheran Church and School and hereby relies upon Plaintiff's demand for jury trial in this matter.

Respectfully submitted,

DEANO C. WARE, P.C.

/s/ Deano C. Ware
Deano C. Ware (P65421)
P.O. Box 40162
Redford, Michigan 48240
(313) 541-8433
attorneyware@msn.com

Dated: October 29, 2007

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2007, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to the following Omar Weaver, and I hereby certify I have mailed by United States Postal Service the document to the following non-ECF participants: _____

_____.

Respectfully submitted,

DEANO C. WARE, P.C.

/s/ Deano C. Ware
Deano C. Ware (P65421)
P.O. Box 40162
Redford, Michigan 48240
(313) 541-8433
attorneyware@msn.com

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed 04/19/08]

Hon. Patrick J. Duggan
Case No. 2:07-cv-14124

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

v.

HOSANNA TABOR EVANGELICAL
LUTHERAN CHURCH AND SCHOOL,
Defendant,

and

CHERYL PERICH,
Plaintiff/Intervenor,

v.

HOSANNA TABOR EVANGELICAL
LUTHERAN CHURCH AND SCHOOL,
Defendant.

Omar Weaver
Equal Employment
Opportunity Commission
Attorneys for Plaintiff
865 Patrick V. McNamara
Building
477 Michigan Avenue
(313) 226-3407

Deano C. Ware, P.C.
Deano C. Ware (P65421)
Attorneys for Defendant
P.O. Box 40162
Redford, Michigan 48240
(313) 541-8433

VERCRUYSSE MURRAY & CALZONE, P.C.
James E. Roach (P51792)
31780 Telegraph Road
Suite 200
Bingham Farms, Michigan 48025
(248) 540-8019
Jroach@vmclaw.com

DEFENDANT HOSANNA TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL'S ANSWER AND AFFIRMATIVE DEFENSES TO INTERVENING COMPLAINT OF PLAINTIFF/INTERVENOR CHERYL PERICH

NOW COMES, Deano C. Ware, counsel for Defendant Hosanna Tabor Evangelical Lutheran Church and School and states as follows for its Answer and Affirmative Defenses to Plaintiff/Intervenor Cheryl Perich's Intervening complaint:

JURISDICTION AND VENUE

1. Denied. Defendant denies that this court has jurisdiction over this matter as Defendant denies that the complainant Cheryl Perich ("Perich") has a "disability" as that term is defined under Title I of the Americans with Disabilities Act of 1990 ("ADA"). Defendant further denies that this court has jurisdiction over this matter because Defendant neither admits nor denies that at all times relevant to this complaint, Defendant Hosanna Tabor was an employer covered under the ADA. Defendant further denies that this court has jurisdiction over this matter as Plaintiff has failed to attempt to conciliate this matter with Defendant in a good faith manner.

2. Admitted in part. Defendant only admits that Perich has a right to intervene in this action in order to pursue her claims under the Americans with Disabilities Act of 1990 ("ADA"). Defendant denies that Perich has a right to intervene in this action in order to add state claims under the Michigan Elliott Larsen Civil Rights Act that are time barred.

3. Admitted.

4. Denied as untrue. As Perich's state law claims are not so related to claims in this action that they form part of the same case or controversy, rather Perich's state law claims fail as a matter of law and are beyond the applicable statute of limitations governing the filing of such claims.

STATEMENT OF FACTS

5. Admitted in part. Defendant only admits that Perich began her service with Defendant in 1999.

6. Neither admitted or denied as Defendant is without knowledge or information sufficient to form a belief about the truth of the information at this time to either admit or deny the allegation.

7. Neither admitted or denied as Defendant is without knowledge or information sufficient to form a belief about the truth of the information at this time to either admit or deny the allegation.

8. Denied as untrue because Plaintiff's allegation inaccurately states what was said, omits part of what was said, relies upon hearsay and is stated out of place and time.

9. Denied as untrue because Plaintiff's allegation either mischaracterizes the meeting that was held and the decision that was made at that meeting or refers to some other meeting of which Defendant has no knowledge.

10. Neither admitted or denied as Defendant is without knowledge or information sufficient to form a belief about the truth of the information at this time to either admit or deny the allegation.

11. Denied as untrue. Plaintiff's allegations are not factually accurate or are simply false.

12. Admitted in part. Admit only that a meeting took place on February 13, 2005. Plaintiff's other allegations as to what transpired at the meeting or what was said are not factually accurate or are simply false.

13. Denied as untrue. Plaintiff's allegations are hearsay and are not factually accurate or are simply false.

14. Denied as untrue. Plaintiff's allegations are hearsay and assign statements to a "Board" without identifying any specific member of the board who may have made the statement or whether the statement was even made by someone who was actually a member of the board. Further, Plaintiff's allegations are factually inaccurate or simply false.

15. Neither admitted or denied as Defendant is without knowledge or information sufficient to form a belief about the truth of the information at this time to either admit or deny the allegation.

16. Denied that Perich "went to the school to report to work upon the expiration of her disability leave". Admit that Perich came to the school and caused a disturbance. Denied that Hoeft made any of the statements alleged as they are stated in the allegation. Admit that Perich was sent a letter that day based on her conduct that day at the school. Denied as to the contents of the letter as the actual letter speaks for itself.

17. Denied as untrue. Plaintiff's allegations are hearsay and are not factually accurate or are simply false. But upon information and belief, Perich never said anything about "asserting her legal rights against discrimination". Instead, upon information and belief, Ms. Perich simply indicated at some point in time in the course of these events that "she would sue" without stating for what or on what basis.

18. Denied as untrue. The letter, in part, notified Perich that a vote would be held to "rescind her call".

19. Denied. Defendant admits that a letter notifying Defendant that her "call" had been rescinded was dated April 10, 2005.

20. Admit in part. Defendant admits that Perich filed a charge with the EEOC. Defendant neither admits or denies the date that the charge was filed as Defendant is without knowledge or information sufficient to form a belief as to the truth of the matter asserted.

21. Admitted

Count I

Retaliation In Violation of the Americans with Disabilities Act

22. Defendant incorporates and realleges by reference the responses set forth in paragraphs 1 through 21.

23. Denied. Defendant Hosana Tabor denies that it was an "employer" as defined by the Act in general based on its number of employees and specifically as to Perich based on her "called" status.

24. Denied as untrue.

25. Denied.

26. Denied.

Count II

Retaliation In Violation of the Michigan's Persons with Disabilities Civil Rights Act

27. Defendant incorporates and realleges by reference the responses set forth in paragraphs 1 through 26.

28. Admitted in part. Denied in part. Defendant Hosana Tabor denies that it "employed" Perich as defined by the PDCRA based on her "called" status.

29. Neither admitted or denied as the allegation fails to allege an issue of fact and calls for a legal conclusion.

30. Denied.

PRAYER FOR RELIEF

WHEREFORE, Defendant respectfully request that Plaintiff/Intervenor, Cheryl Perich's, prayer for relief be denied, her intervening complaint be dismissed with prejudice and that this court enter an order awarding Defendant its costs and attorney fees incurred in the defense of this matter.

Respectfully submitted,

DEANO C. WARE, P.C.

/s/ Deano C. Ware

Deano C. Ware (P65421)
P.O. Box 40162
Redford, Michigan 48240
(313) 541-8433
attorneyware@msn.com

Dated: April 19, 2008

AFFIRMATIVE DEFENSES

NOW COMES the Defendant, Hosanna Tabor Evangelical Lutheran Church and School, by and through its attorneys, Deano C. Ware, P.C., and by way of Affirmative Defenses, states that it will rely upon and insist in its defense and demand a reply hereto:

1. Plaintiff's Complaint fails to state a claim upon which relief may be granted under the ADA or the PDCRA because as a "called" minister, Plaintiff was not an "employee" as defined under the ADA or PDCRA and the cases interpreting same.

2. Plaintiff's ADA and PDCRA claims are barred by statute as Plaintiff has failed to comply with all the necessary requisites for filing a lawsuit under the Acts including but not limited to meaningful conciliation efforts.

3. Plaintiff's PDCRA claims are barred by the applicable statute of limitations and are time barred.

4. Plaintiff's claims are barred by a statute of repose as provided in the ADA and PDCRA.

5. Lack of Jurisdiction. This court lacks subject matter jurisdiction over this matter as Plaintiff's claims are not governed by the ADA.

6. Laches. Plaintiff's claims are barred in whole or part by the doctrine of laches.

7. Defendant's actions are covered in whole or part by the separation clause of the United States Constitution and ecclesiastical in nature

such that this court is barred from ruling on them.

8. Failure to Mitigate. Plaintiff's claims are barred in whole or part by her failure to mitigate her damages as required by Act by refusing to take employment elsewhere in the synod or seeking employment during the pendency of this action.

9. Defendant reserves the right to amend its affirmative defenses as further defenses become known through the course of discovery.

Respectfully submitted,

DEANO C. WARE, P.C.

/s/ Deano C. Ware

Deano C. Ware (P65421)
P.O. Box 40162
Redford, Michigan 48240
(313) 541-8433
attorneyware@msn.com

Dated: April 19, 2008

RELIANCE UPON JURY DEMAND

NOW COMES the Defendant, Hosanna Tabor Evangelical Lutheran Church and School and hereby relies upon Plaintiff, EEOC's previously filed demand for jury trial in this matter.

Respectfully submitted,

DEANO C. WARE, P.C.

/s/ Deano C. Ware
Deano C. Ware (P65421)
P.O. Box 40162
Redford, Michigan 48240
(313) 541-8433
attorneyware@msn.com

Dated: April 19, 2008

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2008, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to the following Omar Weaver, James Roach and I hereby certify I have mailed by United States Postal Service the document to the following non-ECF participants:

Respectfully submitted,

DEANO C. WARE, P.C.

/s/ Deano C. Ware
Deano C. Ware (P65421)
P.O. Box 40162
Redford, Michigan 48240
(313) 541-8433
attorneyware@msn.com

[Logo]

HOSANNA-TABOR LUTHERAN
CHURCH AND SCHOOL

The Lutheran Church-Missouri Synod
9600 Leverne, Redford, Michigan 48239

Church Phone (313) 937-2424
Fax (313) 937-2173
School Phone (313) 937-2233

Dr. Steven M. Eggers,
Pastor

Mrs. Stacy Hoeft,
Principal

4/11/05

Mrs. Perich,

This letter is to inform you of the action taken by the Voter's Assembly of Hosanna-Tabor Lutheran Church at the request of the Board of Education. The Voter's Assembly has hereby rescinded you Call as of April 10, 2005.

Please make arrangements through our attorneys to retrieve your personal items and to return your keys.

Yours in Christ,

Scott Allen Salo
Board of Education Chairman

James Pranschke
Congregation President

cc. Bruce Braun, Deano Ware

Visit us on our website: www.Hosannatabor.org
Email: shoeft@hosannatabor.org
Email: drsteve@ameritech.net

[Page Intentionally Left Blank]

(ECCLESIASTICAL CORPORATION)

ARTICLES OF ASSOCIATION

We, the undersigned, desiring to become incorporated under the provisions of Act No. [illegible] of A. [illegible] as amended, do hereby make, execute and adopt the following articles of association, to wit:

First, the name assumed by this corporation and by which it shall be known in [illegible] The

Suzanne [redacted] Evangelical Lutheran Church

Second, The location of said church or society shall be in the Township of Redford

county of Wayne and state of Michigan.

Mailing address of registered office [illegible] Plymouth Rd. Detroit 28 Michigan

Third, The time for which said corporation shall be created shall be [illegible]

Fourth, The members of said church or society shall worship and labor together according to the discipline rules and usage of the Lutheran Church - Missouri Synod church in the United States of America, or other jurisdiction as the case may be, as from time to time authorized and declared by the

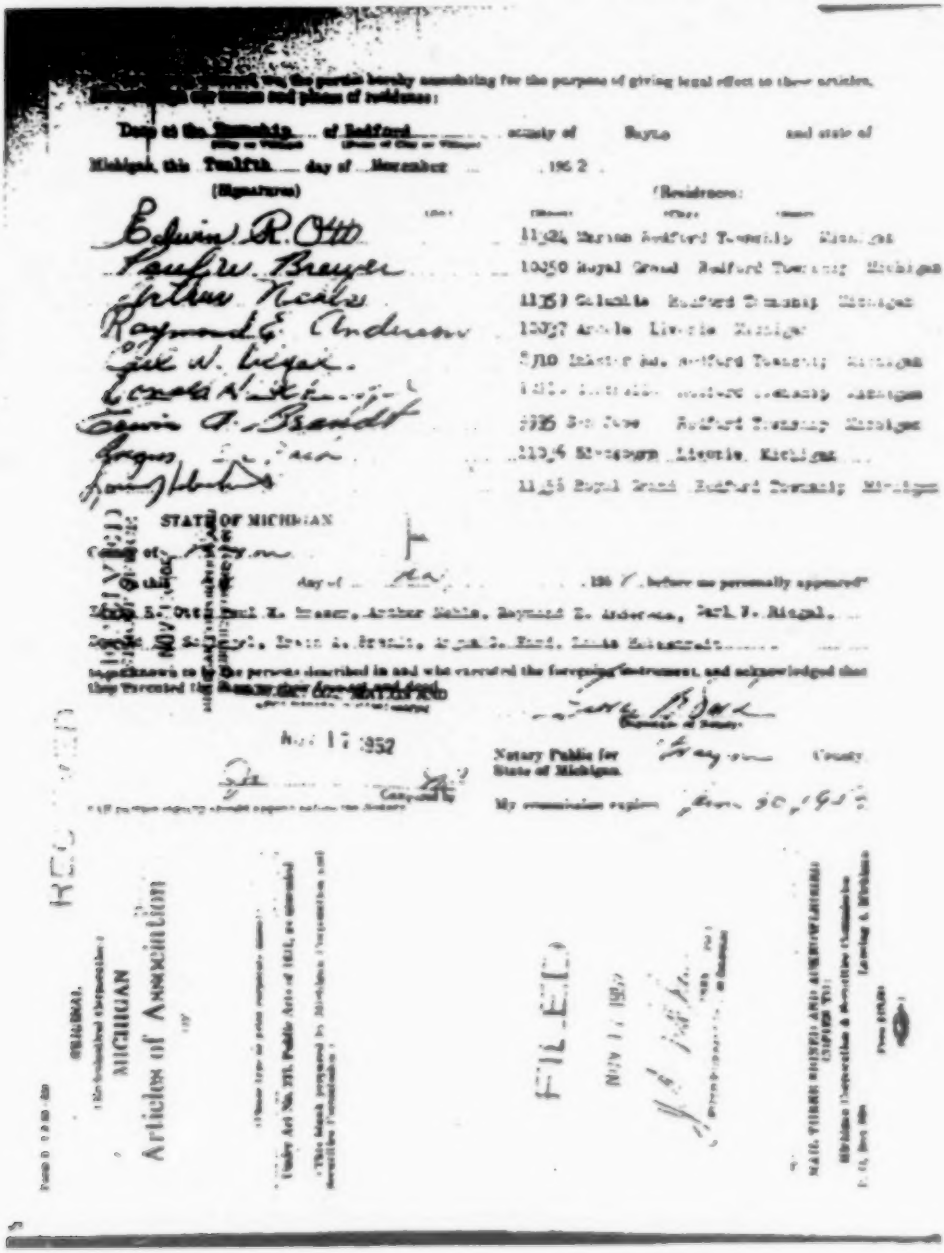
[illegible]

Fifth, [illegible]

FORM 3

39

Best copy available



Articles of Association

FILED

Best copy available

[Logo]

Concordia College
4090 Geddes
Ann Arbor MI, 48105-2797
School of Continuing Education
Tel: 734-995-7583
Fax: 734-995-7587

February 29, 2000

Cheryl Perich
3306 Edgeworth
Ferndale, MI 48220

Dear Cheryl:

Greeting in the name of our Lord.

The colloquy approval process has now been complete with the faculty's approval of your candidacy for synodical placement. Thus, you are now eligible for status on the official roster of "Teachers of the Missouri Synod" in The Lutheran Annual. Please inform your congregation they may begin call procedures by sending call papers to our Placement Director, Dr. Gilbert Sernett.

An official certificate of admission into the teaching ministry of the Luther Church-Missouri Synod by colloquy is enclosed.

If you name has not already appeared in The Lutheran Witness as an official announcement, it will be published in a forthcoming issue.

Congratulations! May all God's great blessings rest on you as you continue to serve Him.

In His Service,

/s/ Jane

Jane Talcott, Director
Continuing Education
A college of the Concordia University System

[Logo]

THE LUTHERAN CHURCH—MISSOURI SYNOD

Minister of Religion, Commissioned

DIPLOMA of VOCATION

IN THE NAME OF GOD THE FATHER,
THE SON, AND THE HOLY SPIRIT. AMEN.

To Cheryl Perich

Dear Friend in Christ,

Having called on the Lord, our God, for guidance and in the exercise of the authority with which He has vested His church on earth, we, the members of Hosanna-Tabor Lutheran Church & School of Redford, Michigan in lawful meeting on March 25th, have elected you as Kindergarten Teacher and herewith extend to you this formal notification of your solemn call.

In the name of the Triune God and by His authority we ask you to assume the responsibilities of the office to which we have called you and faithfully to perform all the duties of your office according to the Word of God and the confessional standards of the Evangelical Lutheran Church as drawn from the Sacred Scriptures and contained in the Book of Concord. We ask you to do this according to the needs as specified in the accompanying document or as agreed upon when new needs arise. To the end that you may be enabled to do this, we pledge you our wholehearted and continuing cooperation and support in word and deed and in our prayers to God in your behalf.

We pray God, the Father of our Lord Jesus Christ, who has moved us to extend our call to you, to convince you by His Holy Spirit that it comes from Him; to induce you to accept it; to conduct you safely to your field of labor; and to bless your ministrations to the glory of His holy name, the building of His church, the temporal and eternal welfare of many people, and your own great joy and blessing.

Signed this 29th day of March, A.D. 2000), on behalf of Hosanna-Tabor Lutheran by _____

/s/ [Illegible] _____ /s/ [Illegible] _____

/s/ [Illegible] _____ /s/ [Illegible] _____

The Lutheran Annual 2002 of
The Lutheran Church-Missouri Synod

Compiled by

Department of General Services
Office of Rosters and Statistics

Published by

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Phone (314) 268-1000
Night Phone (314) 268-1111

On the cover: Concordia Historical Institute celebrates 75 years of service. Pictured, Dr. Gerhardt Kramer, longtime member and former president of the Concordia Historical Institute, gathers with friends around a carriage that belonged to C.F.W. Walther, the founder and first president of what is now the Lutheran Church-Missouri Synod. Walther used the carriage as he traveled to the four congregations he served in St. Louis, Missouri. At the upper right, Dr. Robert King, a vice-president of the Synod, holds the Miessler chalice, used while serving a Chippewa Indian mission from 1851 to 1869. At center, is a first edition of the Book of Concord, published in 1580 and part of CHI's collection. The reference sits on a table in a cabin on CHI'S ground. The cabin is a reproduction of the original Concordia College located in Perry County, Missouri. In the background is a page from the original constitution of the German Evangelical Lutheran Synod of Missouri, Ohio, and Other States, written in 1847.

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* * *

[285] Commissioned Ministers—Teachers

PEEK PFUND

* * *

PERICH CHERYL S (248) 399-2046
3306 Edgeworth Ferndale MI 48220-3422 • MI • Tchr • Hosanna-Tabor Redford MI • (313) 937-2424 • (CQ 1999)

* * *

TEACHERS CONTRACT

CONGREGATIONS OF THE LUTHERAN CHURCH-MISSOURI SYNOD

In the name of the Father, the Son, and the Holy Spirit. Amen.

By the authority with which the Lord our God has vested His church on earth, Hosanna-Tabor Lutheran Congregation of Redford, Michigan offers this contract to Cheryl Perich as a teacher in its school for the term beginning August 15th, 1999 and ending June 15, 2000, with the understanding that the contract may be renewed or altered by mutual agreement.

By signing this contract, the teacher obligates himself/herself to perform faithfully the services specified in the accompanying document, which is to be considered a part of the contract. These services are to be performed according to the Word of God and the confessional standards of the Evangelical Lutheran Church as drawn from the Sacred Scriptures and found in the Book of Concord, particularly in Dr. Martin Luther's Small Catechism. The teacher also expresses the determination to work toward greater competence in Christian teaching; to maintain Christian discipline in love; to work in Christian harmony with principal, fellow teachers, pastor, and board of education; and to set a Christian example.

By signing this contract, the congregation through its officers pledges the teacher its prayerful cooperation and support, its respect for the teacher's office, and its intention to deal with the teacher in Christian love.

We pray God, the Father of our Lord Jesus Christ, to bless the teacher's service in our church and school

to the glory of God's holy name, the building of His church, the temporal and eternal welfare of many people, and the teacher's own great joy and blessing.

This contract becomes effective for the designated school term when signed by both parties.

Signed this 19th day of JUL A.D. 1999 on behalf of Hosanna-Tabor Lutheran Congregation

By

/s/ [Illegible] _____

_____ _____

Signature of teacher: Cheryl Perich Date: July 20, 1999

SUPPLEMENT TO THE DIPLOMA OF VOCATION

Minister of Religion, Commissioned[*]

To Cheryl Perich

Who is herewith called to the position of Kindergarten of Hosanna-Tabor Church & School at Redford, Michigan.

In the name of the Triune God and by His authority we hereby authorize and obligate you:

To teach faithfully the Word of God, the Sacred Scriptures, in its truth and purity and as set forth in all the symbolical books of the Evangelical Lutheran Church;

To exemplify the Christian faith and life, to function in an atmosphere of love and order characteristic of the Body of Christ at work, and to lead others toward Christian maturity;

To show a due concern for all the phases of ministry, especially to work for the promotion and improvement of all efforts in Christian education;

To exemplify Christian discipleship and witness, to live in Christian unity with the members of the congregation and co-workers, and to seek earnestly the advancement of the kingdom of God at home and abroad.

To enable you to do this, we hereby obligate ourselves:

To receive you as a called servant of Jesus Christ, loving and honoring, aiding and supporting you with our diligent, faithful assistance and prayers;

---

[*] (teacher, teaching minister, minister or director of Christian education)

To review your skills of ministry and the skills of others in light of our needs in order mutually to redefine and rearticulate your ministerial responsibilities from time to time;

To make appropriate arrangements for your continuing education as a professional person in the ministry of the Gospel;

To provide for your proper maintenance according to our ability and to review your salary, housing arrangements, and all allowances periodically, beginning with the following arrangements:

The total cash salary for 10 months of service is 29,500

_X_ A) to be paid on the 15th day and the last day of each month in the following amount_____

____ B) to be paid the last day of each month in the following amount_____

Housing provisions No Description of housing_____

Blue Cross Plan? Yes_____

Concordia Disability and Survivor Plan? Yes_____

Concordia Retirement Plan? Yes_____

All Cause Accident Insurance Program? No_____

Utilities? No Monthly car allowance? (upkeep)? No (replacement) _____

Travel expenses paid to new location?
Yes ____ No _X_ Amount _____

Moving expenses paid to new location?
Yes ____ No ____ Amount PARTIAL_____

Graduate school/continuing education allowance?
Yes X No ___ Amount/year Variable

Conference/workshop attendance expenses?
Yes X No ___ Amount/year ___

Time off: Days per week Sat/Sun

Annual Holidays Major

Number of annual vacation days

ST. LOUIS, MISSOURI 63122
OFFICE OF ROSTERS AND STATISTICS

PERSONNEL INFORMATION FORM
(PEIF)

Date 6/21/05

NAME Parish (Last) Cheryl (First) Sue (Middle) MAIDEN NAME White DIST MI

ADDRESS 3306 Edgeworth PHONE NO. 248.399.2046 ID NUMBER

CITY Ferndale STATE MI ZIPCODE 48220

SPOUSE deceased E-MAIL ADDRESS Cheryl321@gmail.com

Academic Background

College	City/State	Degree	Yr. Rec'd	Major	Minor
Concordia College	Ann Arbor, MI	College	2000		
Michigan State Univ	East Lansing, MI		1992		
Michigan State Univ	East Lansing, MI	Graduate of Arts	1977	Language Arts	Social Studies
Oakland Com. College	Royal Oak, MI	Graduate of Liberal Arts	1975	Liberal Arts	
Macomb Com. College	Warren, MI	None		Liberal Arts	

Presently Serving _____ Position _____

Certification
(Please only one)

- ☐ Lay Teacher, Non-Synod Trained
- Certified Lay Worker
- Commissioned Minister
  - ☒ Teacher
  - ☐ DCE
  - ☐ Teacher/DCE
  - ☐ Deaconess
  - ☐ DCO
  - ☐ Teacher/DCE/DCO
  - ☐ Lay Minister
- ☐ Dir of Evangelism
- ☐ Lay Minister
- ☐ Lay Teacher
- ☐ Parish Asst
- ☐ Parish Adult
- ☐ Parish Nurse
- ☐ Parish Visitor
- ☐ Synod Visitor

Teacher Certified Date Dec. 13 1988
College Michigan State Univ
State Teaching Certificate:
State Michigan
Type Elem. Continuing
Specialty Language Arts, S.S.
Expiration Date None
Concentration Primary & Middle Elem. grades

For Early Childhood Center Workers
- ☐ High School Graduate
- ☐ HS - 1 Year of College
- ☐ HS - 2 Years of College
- ☒ Early Childhood Certified

Record of Service in Lutheran Education (Schools, University, Vicarage, Student Internship) or Other Experience in Lutheran Ministries: _____

School/Congregation	City/State	Responsibilities	Grade(s)	Years
Hosanna Tabor Luth.	Redford, MI	Preschool Director, Preschool Teacher, Preschool Assistant, Preschool Substitute, Parish Council Member, Parish Council Secretary, Parish Council Vice President, Parish Council President, Choir Director, Choir Member, Choir Accompanist, Sunday School Teacher, Sunday School Director, Sunday School Superintendent, Vacation Bible School Director, Vacation Bible School Teacher, Vacation Bible School Assistant, Vacation Bible School Substitute, Teacher Aide, Teacher Assistant, Substitute Teacher, Child Development Director, Child Development Teacher, Child Development Assistant, Child Development Substitute, Parent Meeting Coordinator, Parent Meeting Leader, Parent Meeting Speaker, Parent Meeting Committee Member, Bible Study Leader, Bible Study Participant, Leader or Planner of Summer Camp, Intersession, Conference, Retreat, Outing, Camping Trip, Counselor, Advisor, Bible Study Leader or Participant, Other	Pre-K	1999-2002
Calvary Lutheran	Lincoln Park, MI			1992-1999
Immanuel Lutheran	Macomb, MI		3 yr. PS	1983-1987

Are you geographically mobile? Yes ___ No ✓ INTERESTED IN A MOVE? Yes ___ Would Consider ___ Undecided ___ NO ___

Best copy available

Experience/Interest – Beside each appropriate item, place an X under E for experience and I for interest for future ministry.

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E	I	B	COMMUNITY
X			Large Urban
			Small Urban
X			Suburban
			Small Town
X			Rural
			Multicultural
			Central City
			All of these

			DISTRICT
			Atlantic
			Cal/Nev/Hawaii
			Pacific Southwest
			Eastern
			English
			Florida-Georgia
			Central Illinois
			Northern Illinois
			Southern Illinois
			Indiana
			Iowa East
			Iowa West
			Kansas
			Michigan
			Mid-South
			Minnesota North
			Minnesota South
			Missouri
			Montana
			Nebraska
			New England
			New Jersey
			North Dakota
			Northwest
			Ohio
			Oklahoma
			Rocky Mountain
			South Dakota
			Southeastern
			Southern
			Texas
			North Wisconsin
			South Wisconsin
			Wyoming
			SELC
			All of the above

E	I	B	SPECIALITIES
			Adult Bible Study
			Assimilation
			Camping Ministry
			Christian Growth
			Children's Ministry
			Drama
			Evangelism
			Gifted
			Individual Inst.
			Library
			Marriage Counsel
			Midweek Child. Classes
			Media
			Min. to Elderly
			Min. to Families
			Multicultural Ed.
			Outdoor Ed.
			Photography
			Student Counseling
			Small Grp Ministry
			Singles Ministry
			School Pupil/Trck
			Sunday School
			Team Teaching
			Teacher Training
			Vac. Bible Sch.
			Volunteer Mgmt.
			Worship Leadership
			Weekend School
			Youth Bible Class
			Youth Ministry

E	I	B	CONGREGATION ADMIN.
			Dir. of Christ. Ed.
			Dir. of Child Ministries
			Dir. of Christian Outreach
			Deaconess
			Dir. of Music Parish
			Dir. of Youth Ministries
			Supt. Pk-Tm Agencies
			Dir of Camps

E	I	B	ELEMENTARY PRESCHOOL ADMIN.
			Dir. Spec. Ed.
X			Dir. Child Care
X			Dir. Preschool
			Dir. Addt. Elem.
			Dir. of Music School
			Elem. Principal
			Asst. Principal

E	I	B	SECONDARY ADMIN.
			Superint.
			Exec. Director
			Principal
			Asst. Principal
			Dir. of Development
			Business Manager
			Counselor/Guid.
			Registrar
			Dir. of Athletics
			Dean of Students
			Dean of Chapel
			Dept. Chair.
			Dir of Student Activities
			Dir. of Admissions
			Media Specialist
			Technology Coordinator

E	I	B	MUSIC
			Adult Choir
			Band
			Bell Choir
			Children's Choir
			Group Song Leader
			Instrumental
			Orchestra
			Organ
			Piano
			School Classroom
			Youth Choir
X	X		Recorder Instruction

ID #

LUTHERAN EDUCATOR INFORMATION FORM

Educator Cheryl Perich Date June 22, 2005

1. What are your personal preferences for ministry?

Specify the type of ministry (teaching and non-teaching) in which you feel God is leading you to serve, in which you sense [illegible] gifted and equipped, and in which you have a strong desire to serve. List special considerations you can make and your [illegible] special interests in ministry.

Another idea: cycling club - [illegible]

I feel that God is leading me to serve in the teaching ministry in the preprimary, or middle elementary grades. Through encouraging students to run faster and further during Gym class (as part of the President's Physical Fitness Program), God has shown me that coaching Cross Country would be something I enjoy, seem to have a gift for. I enjoy singing with the children. God has given me the ability to lead the children as they sing, to teach music theory, and to teach recorders. If a school needs a children's choir director, I'm sure I could do that. (I would need someone else to play the piano.) I've been in my classroom a school year using Accelerated Reader - Advanced Spelling Core [illegible]

2. Personal Interests

a. Describe your family (spouse) and children) and the special needs they have. IV also like to be the Safety Patrol Coach.

Spouse - deceased

Eric - 22 yrs. old, member of St. Paul Lutheran Church - Royal Oak, attends Oakland University

John - 19 yrs. old, member of St. Paul Lutheran Church - Royal Oak, attends Oakland Community College

b. Describe your health My health is great!

I have a health condition that is totally controlled with medication. Now that I'm on the medications, I have more energy than before I got sick. I've also found out that this condition was the underlying reason for several other medical problems. Now that I am being treated for this, I don't have these other medical problems either.

c. Describe your present and preferred housing arrangements

My home is in Farmdale, MI. I prefer to continue living in this same home.

d. (Optional) Desired salary range: $_____ to $_____ (excluding benefits)

3. What is your Philosophy of Educational Ministry?

Educational Ministry is special not just because of the devotional time and the religion class, but because the teacher can bring God into every subject taught in the classroom. Students also, feel free to bring up topics that mention God or Religion during all times of the day. This is very important for them to be able to do as they are growing in their faith. Some children think they know all about God, then are surprised and find out something so different than what their understanding was. During English class, a year ago, I found out through reading a report [illegible] that she understood what good people want to accomplish. I changed her concept of happiness after that class we got to search through faith in what Jesus had done for us. She wrote the [illegible] in her notebook underlined them in her Bible, then changed her report drastically. She told other students who other were discovering a new [illegible]. An Educational Ministry also opens the door to sharing the Gospel Message with parents. I still remember a very memorable parent teacher conference at Immanuel, Newark. It was the last one of the evening. The Mom [illegible] and said, "I have an announcement to make." She stood and announced that she had just accepted Christ as her personal Savior. She stayed until midnight discussing theological [illegible]

4. What is your present ministry?

My present ministry is with the Boy Scouts. I [illegible] anxious to be in the teaching ministry again soon.

5. References: (Persons who know you and can evaluate your [illegible] abilities.)

Name	Position	Office Address	Telephone
Mrs. Ellen Mills	Teacher	9400 Laverne, Redford Twp., MI 48239-2219	(W) 313.937.2233 (H) 313.533.1038
Pastor Witte	Pastor	202 E. Fifth Street, Royal Oak, MI	(W) 248.541.0613 (H) 810.629.1614

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6. Evaluation

EVALUATOR: Indicate your assessment of the educator's performance in each area by choosing the most appropriate rating the following one word descriptions below:

EXCEPTIONAL - Distinguished performance, unique contribution, superior skills
COMMENDABLE - Better than Proficient and exhibited Exceptional performance
PROFICIENT - Fully satisfactory and consistent performance
DEVELOPING - Developing performance, needs strong support and leadership
MARGINAL - Marginal performance. Career analysis would be helpful
UNSATISFACTORY - Unacceptable performance in present position

In the space provided, substantiate your rating by typing statements as several as all of the suggested Sub-Points. Your ratings and comments are provided in good faith for the educator's welfare and the church at large. Discuss your evaluation with the educator. After signing this form and updating all the information requested, return all four pages to the educator or contact person. Thank you

NOTE: The evaluative comments written on this page may be shared with legitimate LCMS calling bodies. Those having access to this information need to keep in mind that the content, while not confidential, is personal and must be used judiciously. Remember the name of an educator on this form does not assure that educator is applying nor being recommended for a specific position. The decision of whether an educator is truly capable and possesses the proper credentials for a specific educational ministry rests with the group responsible for extending a call or contract.

Personal Qualities Comments — One Word Ratings: Commendable — Christian lifestyle, leadership, rapport with children, sense of humor, responsibility, dedication, empathy

Cheryl is a Christian lady looking for ways to serve her Lord. She has a nice sense of humor and enjoys good conversation.

Ministry Qualities Comments — One Word Ratings: Proficient — Judgment, knowledge of church, school, parish, growth potential, philosophy of education

It is my understanding that Cheryl is active in her own parish. We could have benefited from her experience and talents within our congregation.

Christian Education Comments — One Word Ratings: Commendable — working skills, classroom discipline, creativity, theory, discipline, rapport with children, Law-Gospel distinction

Cheryl is always open and willing to learning new ways to meet the needs of her students. She possesses a strong background in traditional education practices yet actively seeks new methods to make her classroom a good learning environment. She has shown good judgment in identifying children with special needs and seeking the proper help for them.

Leadership Abilities Comments — One Word Ratings: Proficient — decision making, planning, organization, motivation, delegation, evaluation, vision, challenging, team skills

Cheryl seems comfortable taking on leadership roles that are assigned to her as long as there are clear guidelines. She will work diligently to complete the task. She seems to feel more comfortable in the role of worker and does a great job at doing what is asked of her.

Optional Comments: Comment on information shared by the educator on the preceding page.

EVALUATOR SIGNATURE [signature] Date 6/22/05

ADDRESS [redacted] TELEPHONE [redacted]
Street, City, State & Zip

8. DISTRICT EXECUTIVE Please add additional comments, sign and return this form to the educator.
Special comments? Yes___ No___ If yes, please telephone my office. Cheryl's health led to the end of her teaching at Hosanna-Tabor. My understanding is that concern is eased with new medication. Cheryl's desire is to return to the classroom. I would encourage contact with her references and a personal interview to determine if her strengths
EXECUTIVE SIGNATURE [signature] Date 6-28-05

ADDRESS 3773 Geddes Rd., Ann Arbor, MI 48105 TELEPHONE 734/ 663-3791
Street, City, State & Zip

9. Educator: Your signature below verifies that you have read this completed form and approve release of this information to legitimate LCMS calling bodies.

10. EDUCATOR'S SIGNATURE Cheryl Frick Date June 12, 2005

meet your ministry needs.

EXHIBIT 1

Hosanna-Tabor Lutheran Church and School

The Lutheran Church – Missouri Synod
9600 Leverne, Redford, Michigan 48239

Church Phone (313) 937-2424
Fax (313) 937-2173
School Phone (313) 937-2233

Dr. Steven M. Eggers, Pastor
Mrs. Stacy Hoeft, Principal

3/19/05

Mrs. Cheryl Perich

This letter is to inform you of a Voter's Meeting that will take place on Sunday, April 10, 2005. The Board of Education has been moved to request that the Voters Assembly of Hosanna-Tabor Lutheran Church rescind your Call. We are taking this action with the approval of the Michigan District Office due to insubordination and disruptive behavior on Tuesday, February 22, 2005. We are also requesting this because we feel that you have damaged, beyond repair, the working relationship you had with the Administration and School Board by threatening to take legal action against Hosanna-Tabor Lutheran Church and School.

Part VII, Section C of the Constitution and By-Laws of Hosanna-Tabor Lutheran Church states:

"Sufficient grounds for deposing a Pastor or duly Called Professional Minister shall be:

1. *Persistent adherence to false doctrine.*
2. *Scandalous lifestyle which causes offense.*
3. *Willful neglect of official duties without cause.*
4. *Evident and protracted incapacity to perform the functions of the sacred office.*

The Board of Directors shall investigate any of the above counts brought against any Pastor or other Professional Minister in consultation with appropriate officers of the Michigan District. If no resolution is found in such process, the matter is submitted for decision to a regular or special meeting of the Congregation. A three fourths majority vote of the Voting Members present at such a meeting is required to depose a Pastor or other Professional Minister."

Therefore, based on numbers three and four of the aforementioned by-laws we will be requesting the Voters Assembly to rescind your Call. If we should receive your request for a peaceful release in writing by Friday, April 8, 2005 we would be willing to consider reinstatement of our previous offer to cover your medical insurance at the HMO rate until December 31, 2005 or until you would gain medical benefits through another agency. Also by requesting a peaceful release the Michigan District will continue to promote your name in hopes to transition you to a new job with another Lutheran School. The District Office will not do so if we end up having to rescind your Call.

Please inform us of your decision as soon as possible, but no later than Friday, April 8, 2005.

/s/ Scott Allen Salo
Scott Allen Salo
Board of Education Chairman
Hosanna-Tabor Lutheran Church

Visit us on our website: www.Hosannatabor.org
Email: shoeft@hosannatabororg
Email: drsteve@ameritech.net

EXHIBIT 2

[1] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed: 07/15/08]

2:07-CV-14124

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

vs.

HOSANNA TABOR EVANGELICAL LUTHERAN
CHURCH AND SCHOOL,
Defendant.

and

CHERYL PERICH,
Plaintiff/Intervenor,

vs.

HOSANNA TABOR EVANGELICAL LUTHERAN
CHURCH AND SCHOOL,
Defendant.

Hon. Patrick J. Duggan

The Deposition of James Edward Pranschke

Wednesday, June 4, 2008

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* * *

[6] A. It will be 20-28 this November.

Q. Do you have any children?

A. I have one child, yes.

Q. Are you employed now?

A. I am.

Q. Where are you working?

A. I work at Blue Cross Blue Shield of Michigan.

Q. Mr. Pranschke, have you done anything today to—have you done anything to prepare for your deposition today?

A. I talked with Deano for a few minutes before—before we came in and I read some documents that my legal staff gave me when I was doing my other deposition.

Q. Your other deposition?

A. The deposition I gave back in September.

Q. Okay.

A. That was a suit involving Blue Cross Blue Shield.

Q. And what documents in particular did you review?

A. Just how to—how to answer questions, tell the truth, be direct, that type of thing.

Q. Are you currently a member of Hosanna Tabor Luthern Church?

A. Yes, I am.

Q. How long have you belonged to the church?

A. My entire life. 53 years.

[7] Q. Does your wife also belong to the church?

A. Yes, she does.

Q. And my understanding is that there is also a school? Hosanna Tabor is not only a church but it's also a Lutheran school?

A. It's one of our missions is a lutheran school, yes.

Q. And is that through grades K through 8 or—

A. We start with preschool, three and four. Preschool through grade eight.

Q. Okay. Have you—can you just tell me all of the positions of service you've had for either the church or the school? Well, let me qualify because you've been there for quite some time. I would say probably within the last five years.

A. The only position I've had in the last five years, I've been president of the congregation. Well, I usher and I do some Sunday school and help with – I mean, I'm involved in a lot of different things, but official position is president.

Q. Okay. And you are going to have to just briefly educate me a little bit.

A. Okay.

Q. What do you do as president of the congregation?

A. Just about everything—no. Official duties are to preside over the—the congregational meetings and [8] the board of directors meetings to provide leadership,

Q. Okay.

A. But I—I have my hands in a lot of different things.

Q. You mentioned the board of directors. Is that a separate body from the board of education?

A. Yes.

Q. Okay. As congregation president are you yet and still a member of the school board even though you are president of the congregation?

A. I'm ex-officio member of every board, but I don't typically attend most board meetings; although, I have been recently because our pastor has left. We don't currently have a pastor and I've been kind of trying to fill his role in the board meetings. So that's been since November my pastor left.

Q. Okay. My understanding is that the members of the board of education are essentially volunteers; is that—

A. Yes. We are all volunteers.

Q. Okay.

A. No one is paid.

Q. Okay.

A. The principal is—I think he or she is an ex-officio member of the school board, so they do not—they don't get a vote but they come to the—to the [9] meetings.

Q. Okay.

MR. WEAVER: Can we mark that please?

MARKED BY THE REPORTER DEPOSITION EXHIBIT NUMBER 1
2:32 pm.

BY MR. WEAVER:

Q. I'm showing you what's been marked as Exhibit 1, which for the record is Hosanna Tabor's answers to the first set of interrogatories. I just want to direct your attention to interrogatory number one, which requests a list of the individuals who served on the board between August 2004 and June 2005. Do you see where I am?

A. Yes, I do.

Q. Okay.

A. It lists my name, but that is incorrect.

Q. What is incorrect about it?

A. I'm not a full member. I'm an ex-officio member.

Q. Okay. And you mentioned the principal was also an ex-officio member?

A. Correct.

Q. And at the time that was Stacey Hoeft?

A. That's correct.

Q. Okay. And with respect to the other people listed [10] there, to your knowledge were they all members at that time?

A. I—I do not remember that far back. I know they have all been involved with the school board, whether they were members—the school board is—kind of fluctuates, so there are members that come and go pretty fluidly.

Q. Okay. Can you think of anyone who may have been a member who is not listed in number—in item one of this interrogatory at the time, 2004-2005?

A. No, I don't know of anyone else.

Q. I may have asked you this already, but are you currently still president of the congregation?

A. Yes, I am.

Q. Okay. Who are the current members of the board? The school board, I'm sorry.

A. Oh, school board. Okay. The chairman is Janeen Rotta, the secretary is Judy Johnston, and I don't know if the other ones on the board if they have a specific function that they do. Lisa Reardon, Tracy Mosure, Sandy Bryer, those are the members.

Q. Okay.

A. And then David Cush, our principal, is ex-officio. Is that five? Janeen—one, two, three, four, five, yeah.

[11] Q. How often does the school board meet?

A. Typically once a month depending if they have—they've been meeting more regular, they are reviewing some handbook or something, I don't know, but typically once a month. And maybe—maybe not in the summer.

Q. Okay.

A. Again, I don't attend the meetings so I don't know for sure.

Q. Okay. Can you tell me your—even though you don't attend meetings, to the best of your knowledge

what is the purpose or function of the board of education? You mentioned a minute ago the review of handbook.

A. To review handbooks, to set policy, that type of thing. It'd be more policy related to the children and the operation of the school. They also offer contracts when we—when we do a contract to the—to the teachers.

We have—we have two types of teachers, call teachers and contract teachers. The call teachers, the school board is not—cannot call somebody. The congregation as a whole calls our teachers.

Q. Okay.

A. So they would go through the process and review and [12] recommend to the board of directors who would then take it to the congregation.

Q. I'm confused. You said the congregation reviews the calls and, what, they make the recommendations to the board of directors?

A. No, no. The school board or—or a call committee.

Q. Okay.

A. Most often made up a lot of members of the school board, they may have like other members. If we're in need of a teacher and we want to call somebody, they would review a list that they would get from our district.

Q. Right.

A. Do interviews and that kind of thing, and then make a recommendation. There might be—typically there is more than one when it gets to the congregation, so there is a choice to be made. And then the congregation in a meeting would—would listen to the recommendation from the school board and—or no recommendation, might—and vote to call it, call a certain teacher.

Q. Okay. And just so that I'm clear, does the board of directors have a role in that or no?

A. Kind of as a sounding board for the school board. The school board would bring it to the board of directors.

[13] Q. Okay.

A. And then my role as president, I would call a special—special meeting, or if it happened to fall—we have three regular meetings a year. If it happened to fall at the right time, we would just have it at our regular meeting.

Q. Okay.

A. The call process.

Q. And so going back to the contract teachers, the board can independently offer contract to a contract teacher?

A. Within budget constraints.

Q. Right. Got it.

A. So if we have budgeted for a teacher and there is an opening, typically the process, they typically like to hire synodically trained teachers who would then be called, okay?

Q. Right.

A. If they are not available then they would—or if the time was short, they would, you know, look for another—another teacher and they would offer a contract, again, within budget constraints. Anything that increases our budget needs to go to the congregation.

Q. Okay. Okay. To the best of your knowledge are call [14] teachers employed by both Hosanna Tabor and the Michigan District of the—

A. No. Just Hosanna Tabor.

Q. Okay. They just—they just become eligible—

A. They become eligible for a call through being synodically trained and being on—what's called being

on the roster of the Lutheran Church of Missouri Senate.

Q. Okay.

A. So the Lutheran Church of Missouri Senate has, you know, stated that these people are eligible for call.

Q. Okay.

A. You understand the three bodies here, the senate versus the district versus the church?

Q. Yes.

A. Okay.

Q. So far.

A. Okay.

Q. Okay. I just want to make sure I understand something about the congregation. The—with respect to the body that votes on, for example, bringing in a call teacher or some other matter, is that—I'm assuming that consists of just certain members empowered to vote versus the entire congregation or is that—

[15] A. Every member 18 and older is eligible to be a voting member.

Q. Okay.

A. In order to be a voting member you have to attend a regular congregational meeting. So we accept—we accept new members to the to the voting assembly a regular meetings. If it is a special meeting, that's not—that's not allowed. We cannot accept new members at a special meeting. A special meeting has to be just what it is called for.

Q. And special meetings just occur as situations might arise?

A. As situations arise, yes.

Q. Okay. Can you tell me what, if any, process occurs with respect to interaction between the school board and the congregation when you want to remove

a called teacher or essentially terminate that person's employment?

A. The school board or any—actually anybody, the school board or board of directors or even district could bring information to the congregation that would show cause for rescinding a call. That's the terminology. You know, so whatever, you know, situation would arise that would require that recommendation to be made. And then the congregation [16] because they have issued the call, they are the only ones that can rescind a call.

Q. Okay. Okay. I'm assuming you know Cheryl Perich?

A. Yes.

Q. Okay. And she used to teach for Hosanna Tabor, correct?

A. Correct.

Q. I'm representing to you that the last school year she worked was 2003 through 2004, is that—would you dispute that?

A. I—I don't remember what year it would be.

Q. Okay. Is it your understanding that in the fall of 2005 she was on a disability?

A. I knew she was on a disability. I wouldn't—I couldn't remember the exact time of that, but it was the fall before all this transpired.

Q. Okay. And do you have any knowledge or any idea whatsoever how long she was on a disability leave?

A. I think it was at least—at least six months.

Q. You mean six months before making an attempt to return to work? I just want to clarify that.

A. She was out of the classroom six months when the school board was taking action to—to put in another—in another teacher.

Q. Okay.

[17] A. Prior to that they were combining classrooms and that was not working out very well.

Q. Did you become aware at any time during the school year 2004-2005 that Ms. Perich had been diagnosed with narcolepsy?

A. Somewhere in that period, yeah, I attended a school board meeting and became aware of that. Although, I think there was—was diagnosis and new diagnosis and it seemed like we were unclear exactly what—what condition she was being treated for. Or at least I am unclear.

Q. Okay.

A. It seemed like it started with one thing and then went to another thing and they were—trying to rule out things. And again, I didn't follow it real closely so I don't—I don't know.

Q. Okay. But when it was all said and done, the last condition that she had been diagnosed with, that was narcolepsy, nothing else came up after that?

MR. WARE: Well, if you know.

A. I don't know.

BY MR. WEAVER:

Q. You know how to say you don't know if you don't know right?

A. Correct.

[18] Q. All right, thanks.

MR. WARE: And I know how to ask him if he knows.

MR. WEAVER: You can't do that. He—you said at the very beginning of the deposition that he shouldn't answer a question if he doesn't know.

MR. WARE: Then I'll just say objection and I'll ask it anyway, which I can do.

MR. ROACH: Well, that's not an evidentiary objection—

MR. WARE: Well, we won't determine that, the judge will determine that.

MR. ROACH:—evidentiary objection.

MR. WARE: That's what I'm doing. Now, it's not for you to tell me whether it is or not. If I consider it an evidentiary objection, I'm going to make it and preserve it.

MR. WEAVER: You didn't make an objection. You coached him before he answered.

MR. WARE: I'm telling you I'll call an objection.

MR. WEAVER: Then object.

MR. WARE: That's what I'll do then. I mean, it depends on—people do it differently. If you want to be formal, I'll just say objection.

[19] MR. WEAVER: Can you read back the last question and full answer, please?

(The requested portion of the record was read by the reporter.)

BY MR. WEAVER:

Q. Okay. And you mentioned that it came—there was a discussion at a board meeting. Are you referring to a board meeting that took place before the board met with Ms. Perich in February of 2004? In other words, was she at that meeting or was this at some meeting before?

A. I don't remember the details of that. I know there were a couple of meetings that I attended and Ms. Perich was at—was at one of them.

Q. Okay. Do you—can you tell me who shared with the board her diagnosis of narcolepsy?

A. I would—I don't know for sure. I would speculate it was Mrs. Hoeft.

Q. Okay. To the best of your understanding as a lay person do you know what kind of condition that narcolepsy involves or what kind of disorder it might be?

MR. WARE: Objection. Calls for speculation.

BY MR. WEAVER:

Q. Go ahead, you can answer it just based on your [20] understanding generally as a lay person.

A. My understand is that the person falls asleep at—whenever and not—not anything to do with lack of sleep or whatever.

Q. Okay.

MARKED BY THE REPORTER
DEPOSITION EXHIBIT NUMBER 2
2:56 p.m.

BY MR. WEAVER:

Q. Okay. Mr. Pranschke, I'll just show you what's been marked as Exhibit 2.

MR WARE: As an objection can you show me what you are showing him before you give it to him?

MR. WEAVER: Yeah. Sorry about that. Here.

MR. WARE: Thank you.

BY MR. WEAVER:

Q. First, have you seen this recently? For example, before your deposition?

A. No, I did not.

Q. Okay.

A. Well, I have seen this before. Not recently.

Q. Okay. Do you think you may have seen it during the EEOC's investigation process or anything like that?

A. No.

Q. Okay. And for the record, you are looking at meeting [21] minutes from the shareholder meeting that occurred on January 30th, 2005?

A. Yes.

Q. And just for clarification purposes, is the shareholder meeting a congregation meeting?

A. Yes.

Q. Okay. That's just another terminology for it?

A. It's our—it's our once a year meeting that is supposed to resemble a shareholder meeting.

Q. Okay.

A. It is the one we typically talk about goals.

Q. And you can—at this shareholder meeting do you also maybe review any matters or issues regarding the personnel of the church or the school?

A. We could—we could issue calls at that time.

Q. Okay.

A. There might be reports from, you know, various bodies talking about hiring situations and that kind of thing.

Q. Okay. I want to just direct your attention to the second page of Exhibit 2, item number 12, which start proposals concerning our disabled employees and then in parentheses it says refer to attachment. And then the following page there is a proposed policy list of signatures of attendees and then it looks like what is [22] headed options concerning medical benefits for Pastor Eggers and Ms. Perich on the following page.

A. Yes.

Q. Do you see where I am?

A. Uh-huh.

Q. Okay. These last two pages, is it your understanding that these last two pages are the attachments to the meeting minutes?

A. Yes.

Q. Okay. Okay. And with respect to Ms. Perich and item C, on page two it states option two is approved by a majority vote 35 to 8. The timeline will be established by the school board at their next meeting in February. And I'm just going to go to the attachment that refers to option two and I think that's the last page.

A. Okay.

Q. Okay. Option two references a proposal presented by yourself and Mr. Salo, chair of the school board and Bob—is it Cochran?

A. Cochran, yes.

Q. Chair of the board of elders?

A. Yes.

Q. At that time did you have a proposal in writing at this meeting?

[23] A. This is it.

Q. Okay. This is it, the attachment?

A. Correct.

Q. Okay. And tell me what was it that you were proposing at this meeting with respect to Ms. Perich?

A. The proposal was to in—in—in return for premium payments of her medical premium. It seems like that's all. That in return for that, she would give peaceful release from her call.

There are two ways typically that a call is terminated. It's either a person who has been called asks to be—have peaceful release or this other process that we talked about earlier where the congregation would rescind a call.

Q. Okay.

A. But even with a peaceful release, the congregation has to act and grant peaceful release.

Q. Okay. So in exchange for coverage of medical benefits through the end of the calendar year, the

proposal was that Ms. Perich give a peaceful release of her call?

A. Correct.

Q. Is that essentially a resignation?

A. Pretty much, yes.

Q. And when a call teacher gives a peaceful release of her call, it wouldn't be expected for her to—him or [24] her to return the following school year to that same school?

MR. WARE: Objection, leading.

BY MR. WEAVER:

Q. Go ahead.

A. I'm sorry, am I supposed to answer or not?

Q. Yes, go ahead.

A. No, not always. Is that—is that the situation—we have had teachers ask for a release if their call with the idea that they would become a contract teacher. There are—there are—there are benefits to being a call teacher. One of them is that you get to have a portion of your—of your salary designated as a housing allowance and that housing allowance is not taxed.

So if, you know, the teacher was making $30,000 and could—could justify a housing allowance of $20,000, they would only be taxed on 10. But on the flip side of that, then they are considered self—a self-employed individual as far as the IRS is concerned and therefore they have to pay their own Social Security tax and Medicare tax.

Q. Okay. And but—in this particular with respect to Ms. Perich, the—the school was not seeking to convert her from a call teacher to a contract teacher, [25] was it?

A. No, it was not.

Q. And I'm going to go five bullet points down under the alternative proposal that we're looking at in Exhibit 2 which states school administrator and school board feels it is very unlikely Ms. Perich would be physically capable to return to the classroom this year or next year. And just for clarification purposes, the school administrator would be Ms.Hoeft?

A. That's correct.

Q. And was—were there meetings before the shareholder meeting in which this consensus was discussed about Ms. Perich's suitability to return?

A. I—I assume so. I don't—I—I mean, I was at meetings but I can't remember exactly the position of when—it seems that we would not have put this proposal together without having, you know, been to the school board meetings where this was discussed.

Q. Okay. And given your—that you are part of the group of people who are presenting this proposal, were you involved in sharing this opinion that she wasn't fit to come back in the school year in the current school year or the following school year?

A. I was there. I don't know that I rendered an opinion.

Q. Okay.

[26] A. I did not have any interaction with Ms. Perich.

Q. Okay. But is it fair to say that given what's stated here in Exhibit 2 that that was the position of the board at that time?

A. Yes.

Q. And then the next point down it states it's important to the school's operation that Ms. Perich ask for a peaceful release from her call to facilitate a search for replacement. Were you looking for a contract employee to replace her or another called teacher?

A. I believe in the middle of the year it would most likely be a contract teacher.

Q. Okay. And what about the following year?

A. I—I have no idea what—what the plan was. If they were—typically when they hire a contract teacher, if that teacher is working out well, they would continue that relationship.

Q. Okay.

A. And—but typically when they are looking for—for a replacement teacher they would attempt to do a call.

Q. But you guess—okay. Given what's stated here though, it was not the intent—the intent was not for Ms. Perich to return the following school year?

A. That is correct.

Q. And what was the reason for this proposal being [27] presented at the shareholder meeting?

A. Well, as stated in the last one we wanted to do a—a—have a replacement teacher.

Q. I understand that.

A. So we could continue—

Q. Okay.

A.—with the operation of the school.

Q. Okay. Okay. Specifically why it was the—to the position of the board that she was physically incapable to return?

A. Just the reports from doctors and—and her own personal e-mails and communication.

Q. So this determination was based in part on some of the e-mail that may have been exchanged between Ms. Perich and Ms. Hoeft?

A. I believe so, yes.

Q. And would those e-mail also—well, let me back up a minute. You also said that it was based on reports from doctors. What physicians in particular are you—

A. No, I'm not—I'm not—let me—let me rephrase that. It might—it might have been just reports from the doctors contained in the e-mails. I don't—I don't remember for sure if we actually saw a doctor's report or how the—how the—if Stacey was [28] just reporting what she knew.

Q. And was—when you say Stacey you mean Ms. Hoeft?

A. Mrs. Hoeft, I'm sorry.

Q. Okay. Was she also reporting what she knew about Ms. Perich having the condition of narcolepsy or passing out or anything like that, was she sharing that with—

A. She was sharing that, yes.

Q. Okay. But just so we're clear, you are not saying this determination was made because you actually saw any of Ms. Perich's medical records, it was just from what was shared by Ms. Hoeft and those communications with Ms. Perich?

A. I can't honestly remember what I—what I saw.

Q. Okay. I guess I just—you mentioned a minute ago that you wanted to retract from saying that you saw doctor's reports.

A. Yeah, I'm not positive that I saw doctor's reports.

Q. Okay.

A. So it may have been Mrs. Hoeft's report. Yeah, I can't remember—

Q. Okay.

A.—if I saw an actual doctor's report.

Q. Okay. You don't have a medical background, correct?

A. I do not.

[29] Q. So you wouldn't be able to look at doctor's reports and form a—at least in part a determination if she's physically capable of returning to work?

A. No.

Q. Okay. That's all I want to do is just make—get that clear. Have you seen—did Ms. Hoeft share any e-mail with you or the board between she and Ms. Perich?

A. Yes.

Q. Okay. Did she give you copies of those e-mails?

A. I can't—I can't remember for sure if—if I received a copy or—I know it was discussed at the school board.

Q. Okay, that's fair. But at least some of those e-mail. referenced Ms. Perich's condition?

A. Yes.

Q. Okay. You mentioned that the board met with Ms Perich. I'm going to represent to you that the documents reflect, or at least—why don't I just help you out by showing you something.

MARKED BY THE REPORTER DEPOSITION EXHIBIT NUMBER 3

3:17 p.m.

BY MR. WEAVER:

Q. Okay. Mr. Pranschke, I'm showing you what's been

* * *

[58] rephrase if you like.

A. I—I can't—I can't recall any—any other claims.

Q. All right. Then let's just take it a level down. Has anybody who is employed or associated with the church or the school who have complained about discrimination or civil rights issues?

A. No, not that I'm aware of.

Q. Just to clarify, I think you told us about voters?

A. Correct.

Q. Voters is, what, a subclass of congregation members?

A. Correct.

Q. You've repeatedly stated in your testimony that a decision was being put up to vote—

A. Correct.

Q. —by the congregation. That's not quite accurate, is it? Because really what you are asking about is the voters to vote on the particular issues; is that right?

A. That's correct. Just terminology. That—every adult member is eligible to be a voter. So you say you put it out to the congregation, every one in the congregation is eligible to come and participate.

Q. To become a voter?

A. To become a voter.

[59] Q. All right. Before you—if I, for instance, joined the church, I would have to, in essence, apply for and get approved to act as a voter, correct?

A. No. It's easier than—you come to a meeting and we accept you.

Q. All right.

A. So it's basically the first part of every one of our regular congregational meetings, are there any new members, are there any new participants, and if so, we accept them as voting members.

Q. Why would you have the difference? Why is there a difference between just asking everybody in the congregation to vote?

A. I think the difference is that if it's a special meeting and there is a particular topic that's going to be discussed, that people who have had no interest in the past would—would come and—and sway the vote one way or the other. I think that—I don't—I didn't write the constitution. I was—I was in office when we—when we did the—when we did our new constitution.

Q. Okay. On April 10th, 2005, there was a meeting of the voters regarding Mrs. Perich's call, correct?

A. I believe that was the date. I don't—

Q. Did you understand that Mrs. Hoeft had called[60] particular voters to attend that meeting?

A. I did not know that, no.

Q. Do you have any knowledge whatsoever as to how notice was provided as to this meeting taking police?

A. We are required to give—it has to be in the worship service that a special meeting is being called, so that is the only requirement as far as notice of a special meeting.

Q. In the past has the congregation or the voters ever voted on rescinding a call? An involuntary rescinding of a call?

A. Not that I remember, no.

Q. And you've been there how long?

A. I've not I've not been in that type of a position. I've been president maybe 10, 12 years.

Q. You were in what position before that time?

A. I was—I'm trying to remember the sequence of events. I was head of the stewardship board prior to that for maybe four years maybe. I was an elder before that.

Q. Okay.

A. So—

Q. So the—the—

A. I don't remember, since I've been—

Q. Determination?

[61] A.—since I've been out of college, which is 30 some years, I don't remember a—rescinding at all.

Q. Or, in essence, firing somebody?

MR. WARE: I'm going to object as to—

BY MR. ROACH:

Q. You can answer.

MR. WARE: I'm going to object as to the—what's the word I'm looking—as to the characterization of—

MR. ROACH: I think firing is a—

A. Typically—typically what happens is a discussion is had to—to get a peaceful release, if it is a call position. We have done that. There have been—there have been occasions where we have—we have asked for a peaceful release and it was granted. Contract teachers, I think—I don't know whether we've—I think the contract goes for a year or whatever and I think we've decided not to renew contracts.

BY MR ROACH:

Q. Going back to my question, when the voter group, as recommended by the board of directors, decides to rescind a call, rescind a call, in essence, this employee is being fired, correct, versus employment is being terminated involuntarily?

[62] A. Yeah, that's probably fair.

Q. Okay. As to these voters meetings—well, actually we only know of one now—regarding this Ms. Perich, the vote to terminate her employment, who determined who get to—who was able to vote?

A. People—people sign in to the—to the assembly and we don't, you know, we don't validate, you know, are they—are they a member or whatever.

Q. To your knowledge do some of those people who attended had not been there for awhile as far as attending the church?

A. Oh, I have—I have no idea.

Q. Okay.

A. We—we do have meetings that get more attention than others.

Q. Through Mr. Ware's office we received several meeting minutes, copies of meeting minutes. I believe

there is the January 30th, 2005 shareholder meeting and also the minutes for the April 10th, 2005 meeting regarding the voters, correct?

A. Uh-huh.

Q. Do you know the documents I'm talking about, those minute—

A. I—I have not reviewed them. I know that they exist.

[63] Q. I believe we looked at one of those.

A. We looked at the January—

Q. All right. Are there any other meeting minutes to your knowledge that were drafted or prepared or any other notes regarding meetings that—in which Mrs. Perich was discussed?

A. I—I assume there are school board minutes, but I—I don't get copies of those.

Q. All right. So if we want to see what was taking place in these meetings, the school board meetings, we would need to look at those school board meeting minutes then, correct?

A. Yes.

Q. Who do we look for? I mean, who has those meeting minutes?

A: I don't know. We just—we just changed chair people or chairperson. I—I don't know where they—where they reside.

Q. Okay. You were involved, at least to some extent, regarding Ms. Perich's employment, correct?

A. I assume I presided over the meeting when we called Mrs. Perich, although there have been been times when I haven't been able to be at a meeting. I was at several school board meetings when that was discussed

Q. And—

[64] A. And I was at the two congregational meetings where it was discussed.

Q. And you were asked also asked to meet with Mrs. Perich with Mr. Salo prior to the February 13, 2005 meeting, correct?

A. I don't—I don't remember that meeting.

Q. Did you ever write down any notes as to what happened?

A. I may have.

Q. Do you have those notes?

A. Oh, my gosh. My organizational skills are not real well.

Q. Well, we're going to be—

A. I may—

Q.—requesting those documents so if they do exist we'll request copies of those just to give you a heads up. In addition, do you use e-mail?

A. I do.

Q. Have you printed out e-mails in the past or keep e-mails regarding certain subjects on your computer?

A. My—my e-mails from home I could review to see what—what is there. Most things I got, I got at my workplace.

Q. Okay.

A. And I am no longer at the—at the firm I was at the time that this was going on, so I don't have those [65] e-mails.

Q. Okay. I guess I got lost. At your prior firm?

A. Yes.

Q. Not at Blue Cross Blue Shield?

A. No. I've been at Blue Cross two years.

Q. Okay. What did you—where were you employed before that?

A. Gabrielle Roeder Smith & Company.

Q. Is there an internal e-mail communication system within the church and/or the school?

A. All the—all the teachers have an e-mail address, so I guess that's internal.

Q. But do you know whether or not e-mails are saved?

A. I have no idea.

Q. Any back ups?

A. I—I do not know that.

Q. Who would we talk to about asking that? Who takes care of the communication system?

A. Richard Somerset is the one that does most of our computer—computer work.

Q. He's a member?

A. No, He's a—his children are in the school.

Q. Somerset?

A. Set.

Q. Somerset?

* * *

[70] hope and information that they were going to—she was going to return to work. She did not.

Q. All right.

A. And so it was—it was very unreliable.

Q. All right.

A. So even if she did provide that information, it would have been deemed unreliable.

Q. In other words, if even if she told Ms. Hoeft that she was going to return to work in two or three weeks, nobody believed it? You didn't believe her?

A. I don't know that it was provided, so I don't—

Q. All right. Have you ever discussed—have you ever talked with Bruce Braun?

A. Never specifically about this. I may have had a conversation. He took over for George Locke. I always get in trouble with these time frames because it's always longer ago than I thought, but within the last two years I think I may have talked to him briefly at some kind of gathering, but never in an official capacity I don't think I've ever talked to Bruce.

Q. To your knowledge has anyone from the school or the church had discussions with Bruce Braun regarding Ms. Perich?

A. I don't know that for sure.

[71] Q. Do you know why draft letters to Ms. Perich are in the Michigan District's files?

A. No, I do not.

Q. Is there any reason why Stacey Hoeft would be having conversations with Bruce Braun at Michigan District regarding Cheryl Perich?

A. We would—we at times do offer their—I mean, I mentioned that before that we get advice from our district office.

Q. Okay. Maybe now we're getting somewhere. So the—the church does get advice from the Michigan District?

A. When we request, yes.

Q. All right. Regarding human resource issues?

A. I—

Q. Personnel issues?

A. I don't know what specifically we've asked. I know specifically we used district resources with our vision and mission and goals.

Q. So why—what right or how would you get assistance from Michigan District?

A. Call and ask.

Q. How is that available to the church?

A. We're all part of the same—same senate, that's services they offer to congregations in the Michigan.

Q. Does the church pay dues or fees to the Michigan

[72] District?

A. We give—we give contributions to them. It is not—it is not a hard and fast contribution. I mean, it's not—it's not dues, per se.

Q. Okay.

A. It's similar to what our members—our members give a donation when they come to church on Sunday and we in turn take a portion of that and send it to district, district in turns takes a portion of what they receive and sends it to senate. That's how—that's how the organizations are supported.

Q. I believe Mr. Weaver asked you about a school board meeting on February 13th, 2005 regarding Ms. Perich, correct?

A. Uh-huh.

Q. All right. And this was a school board meeting, right, on February 13th, 2005?

A. I believe so, yes.

Q. So the people who would be there would be, in addition to yourself, there'd be Kurt Ostrander?

A. I have no idea who was at that meeting, Not everybody—

Q. Sheila Simpson?

A. Not everybody attends those meetings.

Q. Stacey Hoeft you don't have a clue—

[73] MR. WARE: Objection, asked and answered.

BY MR. ROACH:

Q. Ms. Stacey Hoeft, was she there?

A. I believe she was there, yes.

Q. Do you have any recollection as to how big the meeting was, who was allowed to attend?

A. No. I know that Mr. Salo was there and Mrs. Hoeft. Other than that, I would—I would just be speculating who else was there.

Q. Do you recall that someone asked whether Ellen Mills would be able to attend even though she's not a member of the school board and you were—you responded that she would not be allowed to attend. Do you recall that?

A. I remember reading that in the—in this document. I seem to have a recollection of that request being made.

Q. By you?

A. By—by me?

Q. Yeah.

A. That I requested that Ellen

Q. That Ellen Mills would not be allowed to attend.

MS. PERICH: It wasn't requested by him, it was requested to him.

A. That seems reasonable that I would have decided that.

[74] BY MR. ROACH:

Q. Okay. Do you recall some of the other—some of the comments that were made during that meeting by the school members regarding whether or not Ms. Perich would be able to return to work notwithstanding what her doctor said through the doctors—her doctor's return to work slip, correct? Do you recall those comments?

A. I don't recall specific comments.

Q. Well, let's bounce a couple off of you. Do you recall Stacey saying that she didn't understand how—how Ms. Perich could be responsible for a classroom of children when she wasn't even allowed to drive?

A. I remember hearing that comment. I don't know if it was at that meeting.

Q. Okay. Do you remember the comment that—with Sheila saying I have a medical background and I know that you have to be without symptoms for at least three months before you can be sure that the medicine is working well enough to know that you won't have symptoms again. You can be in front of those children and pass out, that would scare them. Do you recall that comment?

A. I remember that comment. I don't know, again, whether it was in that meeting. I have—I mean, I have [75] conversations with all these people at—many times.

Q. Isn't it true that during the course of this school board meeting that Ms. Perich wanted to return to work and was passing—passing out copies of the return to work and saying that she will be allowed to return to work without restrictions?

A. I don't remember the details of all that. I know that she did express a desire to return to work.

Q. All right. Did you review the letter that was sent to Ms. Perich later saying that the board of directors is going to recommend to the church the termination of her employment?

A. I have read it. I don't think I—I reviewed it before it went out.

Q. Did any—was anybody—was it necessary—let me strike—start over. Was it necessary for anyone to approve this letter before it was being sent out?

A. I think it was discussed at a school board meeting that I was in attendance, that that meeting—that that letter was to be drafted and sent out.

Q. So there should be minutes for that meeting, right?

A. I'm assuming so, yes.

Q. Okay.

MR. ROACH: Let's go ahead and mark that for me, please.

[76] MARKED BY THE REPORTER
DEPOSITION EXHIBIT NUMBER 5 4:49 p.m.
(Off the record at 4:49 p.m.)
(Back on the record at 5:12 p.m.)

BY MR. ROACH:

Q. I believe where we left off was with this letter that's been marked as Exhibit 5. And I can't remem-

ber specifically where we left it, but let me go at it anyway. Did you review this letter before it was being sent to Ms. Perich?

A. I was involved in the conversation that this was going to be drafted, but—

Q. All right.

A. —no, I did not review this.

Q. Do you see anything in this letter that is not accurate?

A. No.

Q. As of the January 30th, 2005 shareholder meeting, there had not—the church had not hired a replacement for Ms. Perich yet, correct?

A. I don't know that. I—I—my recollection was that there was someone going to take over when—when the—the holiday break was over.

Q. Okay. Well, up to—at some point at least there was [77] no replacement or substitute that was hired, correct?

A. Yes. It was anticipated that Ms. Perich was going to return.

Q. All right. I believe, if we look at the January 30th, 2005 meeting minutes, we look at the last page, number two, the last—the bullet point?

A. Uh-huh.

Q. It states it is important to the school's operation that Ms. Perich ask for people (sic) release from her call to facilitate the search for a replacement. Do you read that to understand that Mrs. Replacement (sic) had not been hired to re—

A. That—that seems to imply that.

Q. Okay.

A. I don't remember those facts exactly.

Q. Is it true that a recent graduate from Concordia was hired?

A. Oh, I have no idea who was hired. That was a long time ago.

Q. So you have no clue as to—

A. I—I do not know, no.

Q. So you don't know whether or not the person they hired was a called or a contract employee as opposed to a call employee?

A. I'm fairly confident we would have had a contract.

[78] Q. All right. And when you called those folks as being contract employees, is there in fact a contract with these people? The hires?

A. That would make sense, wouldn't it? I don't know that for sure. I don't know if—if there is a formal document. Again, I assume there is.

Q. Does the school or the church have personnel files?

A. I believe so, yes.

Q. All right. So if we wanted to find or obtain the personnel file for this employee that was hired in January or February or April, whatever the case may be in 2005, we'd get that personnel file and see who it is and a copy of the contract and all that?

A. I would imagine. I've never seen what the contents of a personnel file is. I've had no reason to review any contract or personnel files.

Q. You, if I recall your testimony—and it went for a little while and maybe I was a little confused at the end—Mr. Weaver ask asked you about a conversation you may have had with Ms. Perich after that—the time she returned to work on February 22nd, 2005, correct?

A. He asked me about a conversation—

Q. Actually, lees strike that. Not—after the February 13th, school board meeting.

[79] A. I believe I said I didn't know when the meeting—when call was.

Q. All right.

A. And—and I'm not—I mean, the more we talk about it I think it did occur, but I don't remember.

Q. Well, maybe we can refresh your recollection as to the substance of that conversation. Did you in fact discuss with her about Ms. Perich going back to her doctor and asking the doctor to put her on disability?

A. Did I initiate this call or did—did Ms. Perich?

Q. As I understand it you did, but I'm not certain.

A. Okay. I don't—I don't remember the detail of that.

Q. Okay. Well, even if you don't remember the detail, so to speak, did you have a conversation with Mrs. Perich about her going back to her doctor and getting the doctors to change the records so that she is not eligible to return to work so she can receive—

A. Oh, no. I would have never sent a doctor to return to work.

Q. Huh?

A. I would have never said to change the record that she would not be eligible to return to work. That would not have been a discussion.

Q. Well, what discussion would it have been?

A. I don't—I don't recollect asking her to go talk to [80] her doctor at all.

Q. Didn't you say that—you told her to call the doctor and ask him about it, if he stays with that date, the return to date and won't change it, I'll ask the congregation to give you some monetary help if you a for a peaceful release?

A. I don't remember anything about asking her to talk to her doctor. I do remember saying that we would try to give some monetary if she would give a

peaceful release. In other words, we would—we would increase the offer that we had—had made.

Q. But that an increase in the offer or making it more generous, whatever the case may be, it was never put into writing after that date?

A. I don't believe so, no.

Q. This peaceful release, why is it called a peaceful release?

A. Because it is contrasted to rescinding a call.

Q. Peaceful means it's voluntary?

A. Yes.

Q. All right. Is there—of course it's never happened before, so—

A. Oh, no, peaceful releases are done all the time. If a—if a teacher would accept a call to another congregation or a pastor—

[81] Q. Okay.

A.—they would—they would request a peaceful release from their call to Hosanna Tabor.

Q. All right. Is there any documentation, like those with—for peaceful release?

A. Typically I think they would send a letter to request that.

Q. So just basically means I resign?

A. No. I request a peaceful release from my call is what it would say.

Q. I understand, but is it the equivalent of saying I quit or I resign?

A. No, because it's a call, it's a relationship between a congregation and a—and a member or a servant, so it's not—I guess in the—in the secular world, yeah, it would be a resignation.

Q. Okay. So on April 10th, 2005 there was a vote taker: by the congregation to terminate Ms. Perich's employment, correct?

A. To rescind her call, yes.

Q. Which is the equivalent of termination, right?

MR. WARE: Okay. I'm going to object to argumentative because you keep doing the same thing. Every time he answers a question you recharacterize his answer. That's argumentative.

[82] MR. ROACH: I'll take the answer over the objection.

BY MR. ROACH:

Q. That's the same thing as voting for the termination?

A. Rescinding the call is, again, severing the relationship that we have with this called servant.

Q. All right. And her employment has been terminated, correct?

A. But she hadn't been working anyways, but, yes.

Q. Did you recommend to the voters that she be fired?

MR. WARE: Objection, facts not in evidence. There was no recommendation that she be fired.

MR. ROACH: I'll take the answer over the objection.

A. I presented the—the recommendation from the board of directors. It might have been the school board, I don't remember which.

BY MR. ROACH:

Q. So it wasn't your recommendation that you were presenting, it was the board of director's recommendations?

A. I'm a member of the board of directors.

Q. All right.

A. No, it was not my personal recommendation.

Q. All right Was that—so there was a decision made [83] of which you were a part of to—

A. And I—again, I don't remember—I don't remember whether it was the board of directors that

brought that motion to the congregation or if it was the school board.

Q. Okay.

A. But I was privy of it before we called a special meeting.

Q. Maybe—I was trying to follow the relationship between the board of directors and the school board and the congregation and the other boards. Do the—does the school board provide recommendations as to either providing a call or hiring an employee, a teacher?

A. Yes.

Q. What about the board of directors, do they provide recommendations as to—

A. Typically it is a call committee that provides the—the slate of candidates basically. The process is you—you ask district for candidates that are—would meet your need as far as a call. Typically, I mean, we've had as many as nine candidates.

Q. People who are eligible for a job?

A. Yes.

Q. All right.

[84] A. And then the call committee—often the call committee for—for a teacher is made up of the board of directors and they are—I mean not—I'm sorry—the school board and there may be other members at large but it is up to the school board chair to convene that call committee. And if you are calling a pastor, it's the board of elders that serves that function.

Q. All right. And I'm still confused so maybe we can clarify this. You have the board of directors?

A. Correct.

Q. Of which you were an ex-officio member, correct?

A. No, board of directors I am a member.

Q. You are a member. Then you have the school board and you are an ex-officio member?

A. Correct.

Q. The call committee is a committee of which, the school board or the board of directors?

A. I don't know the answer to that, It may be of the congregation.

Q. So it's almost like a separate board but called a committee?

A. It's not—it's not a board, it's a temporary assignment and—and typically—so it's hard to—it's hard to separate, you know, what typically [85] happens from what, you know, the constitution says. Typically the school board is instrumental in forming that call committee for a teacher.

Q. All right. Maybe we can clarify it through Exhibit 3, is it? That's actually your copy, but is it Exhibit 3? Looking at the April 10th meeting minutes.

A. April 10th, I don't have those.

MR. WEAVER: I don't think we marked those.

MR. ROACH: Oh, okay. Well, let's mark it.

MARKED BY THE REPORTER
DEPOSITION EXHIBIT NUMBER 6
5:29 p.m.

BY MR. ROACH:

Q. Have you seen this document before?

A. I believe so. I don't—

Q. All right. Let's look at number three on the first page. The first sentence says Cheryl Perich's call as a teacher at Hosanna Tabor Lutheran School dash Scott Salo. Under A it says Jim Pranschke. That's you, right?

A. Uh-huh.

Q. Summarized the events that led up to this meeting including several meetings he and Bob Cochran had attended, all right? So you were involved?

A. I attended—I didn't—I told you I attended [86] several school board meetings.

Q. Why is it when it says Scott Salo next to the line, the first line in number three, why isn't Scott providing a summary as to what events that led up to this vote instead of you?

A. Probably as my role as president I—I told the people what I summarized the events, that's—

Q. Okay.

A. Why did I do it versus Scott? I don't know.

Q. Who is Bob—

A. I tend to do those things.

Q. All right. Who is Bob Cochran?

A. He's our head elder.

Q. There is a board of elders?

A. Board of elders.

Q. All right.

A. Board of elders supervise the—basically the worship service—they are—they are really the main—main board. They supervise the pastor who is the main head of the—head of the church basically and ministry, the pastor is the head of the church. Since the board of elders supervises that, supervises the pastor, they have a—a kind of a special role in a lot of the decisions and stuff that go on.

Q. So would have the board of elders or did the board of [87] elders have involvement with the decisions made concerning Cheryl Perich?

A. Bob I know attended the meetings, some of them, so he was there as an advisor to the—to the board. He would not have had a vote.

Q. Okay. Was the issue ever brought up before the board of elders?

A. I—I do not know that. I did not attend the board of elders meetings.

Q. All right. Let's ask the same question regarding the board of directors. Was the issue of Ms. Perich ever brought before the board of directors?

A. We did discuss it at the board of directors, yes.

Q. All right. At that or at the end of or during the process of this meeting was there a determination or decision as to what should be recommended to the voters regarding Mrs. Perich's employment?

A. The most we would have done was accepting the school board's recommendations. We would have—in other words, we would not have stood in the way.

Q. That's a pretty radical decision, isn't it, first time anybody has ever been—a teacher has been having their call rescinded ever that you can remember?

A. Uh-huh.

Q. Isn't that unusual, something that the board of [88] directors would be looking into and saying well, wait a minute we're firing somebody?

A. Well, it's not the first time that somebody has been asked to resign, to give peaceful release, so it—it—I mean, we have—we have a lot of employees, we have situations that—that need to be—to be dealt with. No, we don't—we don't look into and scrutinize other—other boards. The school board has the responsibility for that area of mission and oftentimes we would take their recommendations, especially since Bob Cochran, who is also on the board of directors, and myself, had attended the meetings. I mean, it didn't—I don't—I don't see your—your foundation for your question. It's—

Q. Okay. Well, I guess what I'm getting into, and it's taking a long way for me to get there perhaps, what I was trying to determine as to who made the decisions other than the voters themselves? In other words, was it Scott—

A. Who decided on the recommendation?

Q. Yes.

A. The school board.

Q. The school board.

A. The school board and it came to—I'm fairly confident it came to the board of directors and we [89] said that's fine, go with—go with your recommendation.

Q. All right.

A. And we'll call a special meeting. Because I have to call the special meeting.

Q. Was there—were there any presentations made to the voters regarding Cheryl Perich at this April 10th—in other words, other than yourself and Scott Salo, did anybody else speak regarding the issue?

A. I don't—I don't remember.

Q. Was there any discussions or presentations provided by Mr. Ware?

A. I don't believe so. I mean, people—people have opportunities to ask questions and—and state various things they know. Some school board member may have spoken. I don't remember that.

Q. Earlier in response to Mr. Weaver's questions you described what you learned to know about Mrs. Perich returning to the school on February 22nd after the expiration of her return. I believe you said that there was a disruption, that was the word.

A. Uh-huh.

Q. Is that the word you used?

A. Maybe. I don't recall. Do you want to see what I said?

[90] Q. Well, I wrote here in quotation marks.

A. That's all right. It can be characterized as that.

Q. I'm just going after the characterization that you made because that's—that was the statement that I heard but there was no details or anything else

as to what constitutes a disruption or a problem or any other name you want to use. What specifically do you know that was an issue or a problem as to Ms. Perich returning to the school on February 22nd, 2005?

A. Well, I thought it was already established that I wasn't there, so I was not witness to any of it.

Q. Is she getting fired for this?

A. For returning to the school?

Q. Yes.

A. No.

Q. Number D or letter D under three, Scott Salo made it clear the reason why the school board is asking the voters to rescind Cheryl Perich's call is not because of her disability but because of her actions since February 22nd, 2005.

A. And the main action there was threatening to sue.

Q. Okay.

A. That is not acceptable conduct of a call person. A call person there is—there is a dispute resolution process that they are required to—to go through.

[91] Q. All right. So that was the issue rather than her showing up at the school?

A. It might have been a combination of all those things.

Q. Okay. Maybe you can clarify something for me. I initially sent a subpoena to the Missouri Lutheran Synod, I know it's a large name—

A. Lutheran Church Missouri Synod.

Q. That's the one. So I sent them a subpoena for documents and I received a phone call and the person—she might have been an attorney, but she was affiliated with the synod—told me that they don't know anything about Hosanna Tabor or Cheryl

Perich. Is the relationship in fact between synod and Hosanna Tabor?

A. Is there a relationship? We are members of the synod yes.

Q. So they should—or not they—it, the synod, should know about Hosanna Tabor?

A. They do.

Q. As a matter of fact, you get disability insurance through the synod, correct?

A. Correct.

Q. Are there any—

A. The worker's benefit program, I believe that's a synodical program.

[92] Q. The only reason that came to mind is when I was looking at the documents that were provided by Hosanna Tabor's attorney, Mr. Ware, it says worker benefit plans Lutheran Church of Missouri Synod and it was the same address, 1333 South Kirkwood Road, so it must be the organization, right?

A. Uh-huh.

Q. Are there any other services that are retained from the synod itself?

A. They operate our seminaries and our colleges that train our teachers and pastors. They send missionaries to various parts of the world, so there is—they—they formulate policies and procedures that—that we—we can't accept, most often we accept as a congregation.

Q. Okay.

MR. ROACH: All right. Were going to take half a minute, if you would, please?

(Off the record 5:41 p.m.)
(Back on the record at 5:48 p.m.)

MR. ROACH: I'm done with questions for right now.

MR. WARE: I don't have anything.

MR. WEAVER: I don't have any either, so—

MR ROACH: You are done.

[93] THE WITNESS: Okay.

(The deposition was concluded at 5:48 p.m. Signature of the witness was not requested by counsel for the respective parties hereto.)

EXHIBIT 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE 2:07-cv-14125

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

-vs-

HOSANNA-TABOR EVANGELICAL
LUTHERAN CHURCH AND SCHOOL,
Defendant.

and

CHERYL PERICH,
Plaintiff/Intervenor,

-vs-

HOSANNA-TABOR EVANGELICAL
LUTHERAN CHURCH AND SCHOOL,
Defendant.

Hon. P.J. Duggan

DEPONENT:	BRUCE BRAUN
DATE:	Wednesday, June 25, 2008
TIME:	8:55 a.m.
LOCATION:	31780 Telegraph Road, Suite 200 Bingham Farms, Michigan
REPORTER:	Angela R. Mitchell, CSR-2151

* * * *

[00006] for the court reporter. So—and if you'd give me an opportunity to finish my question, then provide the answer if you would.

At the same time, I'm human, too. And so if you catch me interrupting you or jumping into my next question before you provide the answer, let me know, because sometimes I just—you know, I'm human, too.

Finally, sometimes—it's important that you understand the question. And so sometimes my questions get pretty convoluted and sometimes it just doesn't make sense.

If you don't understand what I'm asking, please let me know and I'll restate it or, you know, come up with another way to state the question. Because it's important that when I ask a question, you provide an answer and somebody reads a transcript, somebody's going to—or everybody is going to look at that as being your answer to the question I actually asked. Fair enough?

A. Sounds good.

Q. All right. Let's start then.

Who are you currently employed?

A. I'm working with the Michigan District Lutheran Church Missouri Synod.

[00007] Q. Is that the official name?

A. Yes, as far as I know.

Q. And what is your position?

A. Now I'm the superintendent for Lutheran schools.

Q. What are your responsibilities as the superintendent?

A. We have a school system, 88 elementaries, eight high schools and 162 early childhood centers and I'm supposed to oversee them.

Q. And of the schools that you oversee, that includes Hosanna-Tabor?

A. Correct.

Q. What do you do to oversee these schools?

A. Try and make them aware of different trends, things happening in education, work with the Michigan Association of Non-Public Schools to try and make them aware of like laws impacting education, like hours and days of instruction, stuff like that, talk primarily to principals, try and visit classrooms and just get a general feel for it. I try to see what they want me to do for them and then try and do it.

Q. Are the people who are employed with these various schools, are they professional

* * *

[00009] Q. All right. Do you provide advice as far as hiring and firing or similar human resources type?

A. We provide call lists. Do you know what I mean by a call in the Lutheran Church Missouri Synod?

Q. Well, we want to talk about that.

A. Okay. We provide lists of names that have been trained in Lutheran doctrine to schools that are hiring people. And when someone is being terminated, usually, not always, but usually somebody calls me and just says, you know, or ask an opinion.

Q. As far as whether or not somebody should be terminated is what you mean?

A. As far as do I think they're doing the right thing or not.

Q. As far as terminating an employee?

A. Correct.

Q. All right. All right. Well, let's start with the idea of the call list.

As I understand it, the call list, as you were saying a minute ago, I believe, there's a list of potential teachers who are eligible to be placed within a Lutheran School?

[00010] A. That is correct.

Q. How do you provide this list of eligible employees?

A. Now there's a data—there's 18,000 teachers in Lutheran schools across the United States. They all can fill out, we call it a LEIF, a Lutheran Education Information Form. And that form is available online and you can fill it out. And then anybody like at a district office can search on that.

It's kind of like a big database and like you'd check, I like teaching third grade, coaching volleyball and I can teach handbells.

And then if I have a school that's looking for a third grade teacher who can coach volleyball and do handbells, you come up on that list.

Q. Okay. Do you provide any kind of—well, first off as far as the Michigan District goes, do you handle the call list?

A. My secretary does. I sign them all so I look at them.

Q. Okay. So it's under—within your responsibilities, this call list?

A. Correct.

* * *

[00013] she could never get an answer when Cheryl was coming back. She would communicate with

Cheryl and Cheryl would not communicate back with her.

Q. That's what Ms. Hoeft told you?

A. Yes.

Q. All right. So what was your response?

A. That teachers should talk back to the principal and that you need to—she needs to communicate with you, that that could be a sign of insubordination if you don't respond back at all.

Q. All right. That was your first conversation with Stacey regarding Ms. Perich, right?

A. I really only remember two on the topic. All right. I don't remember which one that was.

Q. Okay. What was the second conversation about?

A. The second one is when she called—Stacey called me and said, you know, we're really considering terminating Cheryl. I said, "That's not my area of expertise, someone with a disability. You need to get an attorney who deals with labor issues, because that's not my area. I'm not an attorney."

Q. Fair enough. What was Mrs. Hoeft's [00014] response?

A. That they would look into getting a labor attorney, somebody who deals with employment issues.

Q. Why did you say that to Ms. Hoeft?

A. Because I don't know if it's legal or not to fire someone who's on a disability. I mean, that's my unattorney take of the law, that I don't know that so I would ask someone who I think knows that.

Q. Okay. I'm going to show you some documents. We'll label that—mark this as Exhibit 1, if you would?

(Marked for identification:
Exhibit No. 1.)

BY MR. ROACH:

Q. If you could just review that, if you would, please?

A. Um-humm. Okay.

Q. All right. Was this a document that's marked as Exhibit 1 from your file at the Michigan District Office?

A. Yes, yes.

Q. Thank you. Were you provided with a copy of this to review prior to this letter being sent to Ms. Perich?

[00015] A. I don't believe so. To my knowledge, no.

Q. Okay. Do you have any recollection as to when you reviewed that document?

A. Well, I'm looking up at the top. I don't know who wrote this, but I'm guessing it's one of my secretaries. I think we got it after the fact. If it's dated 2-8 and up there it says 2-9, I'm guessing I got it after the fact.

Q. All right. Do you recall looking at it?

A. Yes.

Q. All right. Did you have any concerns about that letter?

A. Yes, I might have had a concern or two.

Q. All right. What concerns did you have?

A. Well, I want to make sure that Hosanna-Tabor has run it by an attorney, which I don't see that it says they've done that, who specializes in labor law, to know if they can do what they're saying they want to do.

Q. Do you know who Scott Salo is?

A. Yes, he's a—Well, I can see he's a school board chairperson. I've met him in the past, yes.

Q. Did you have any discussions with Scott Salo regarding Ms. Perich?

[00016] A. Well, I remember talking to Stacey. I don't remember talking to Scott. Does that mean I could have? I could have, but I don't remember talking to Scott. I remember talking to Stacey.

Q. All right. After you reviewed this letter—and by the way, this is the letter dated February 8, 2005 from Cheryl—or to Cheryl Perich from Scott Salo—did you call Stacey Hoeft to express your concerns?

A. I don't know if I called, but I think I saw her at—like we have regional principal meetings and I believe I saw her at a regional principals meeting and said, "Did you get somebody in labor law to look at what you're doing?"

Q. And what was her response?

A. Yes. Yes, they did.

MR. ROACH: Mark this one.

(Marked for identification:
Exhibit No. 2.)

BY MR. ROACH:

Q. Mr. Braun, I've handed you a document that's marked as Exhibit 2, that is dated March 19, 2005 to Cheryl Perich from Scott Salo. Is this document also in your file at the Michigan District?

A. Yes.

[00017] Q. Did someone provide you with a copy of this letter

A. Yes. I'm assuming Scott Salo.

Q. Okay. Do you have any recollection as to any discussion with Scott Salo concerning this letter?

A. Not—I have no recollection of discussing it with Scott.

Q. All right. Would you ask someone to review this document before Hosanna-Tabor sends it out?

A. Say it again.

Q. Yes. Did you review or be asked to review this letter prior to it being sent out to Ms. Perich?

A. No.

Q. Did you have any discussion with Ms. Hoeft concerning this letter?

A. No.

Q. Did you—cause you to have any concerns about this letter?

A. When I look at it, am I concerned about it?

Q. Yes.

A. Yes. I mean, once again, I'm wondering [00018] did Hosanna-Tabor run this by somebody who specializes in employment law who works with disabilities all the time, things like that, yes.

Q. Okay. Did you see in the second to last paragraph where the sentence, the last two sentences read, "Also by requesting a peaceful release the Michigan District will continue to promote your name in hopes to transition you to a new job with another Lutheran School. The District Office will not do so if we end up having to rescind your Call." Did you see that?

A. Yes.

Q. Is that correct?

A. Is that correct? Yes, I mean that's the usual protocol, that if someone has a call rescinded, it's awful hard to get another school to think they're going to be teaching there.

Q. Okay. And that—in essence, when you're talking about the rescind of a call, it's somebody who's been fired, correct?

A. Yes. I mean, that's basically what it means in contract law, I would guess.

Q. Did you have any discussion with Ms. Hoeft or anybody else at Hosanna-Tabor regarding Ms. Perich invoking the alternative dispute

* * *

[00024] A. Well, my opinion is that I have an obligation still, all right, to try to help Cheryl find employment, which I'm not on the end at the other school where I'm actually hiring her.

So for me to provide her name to them, I think is a service to somebody on the roster at Synod because Cheryl intended to stay on the roster at Synod.

Q. Okay, I did not understand the last thing that you said.

A. Well, Cheryl, when she got the letter from our office, she could have chose to resign from the roster. She can choose to stay on the roster. She has a choice, if she gets this letter and it says, what would you like to do with your roster status?

What I remember is Cheryl wanted to stay on the roster of Synod. And I think Cheryl is still on the roster of Synod.

Q. Okay.

A. So I guess I'm looking at it saying, then, I should probably try and send Cheryl's name around in the area where I know she wouldn't have to move, because I knew she was geographically immobile, so—

[00025] Q. All right. So you sent the roster to various schools?

A. Well, I sent it to Lutheran Special Education Ministry.

Q. Is that the only one place you sent—

A. Yes, yes. I can check. Just one second.

Q. Okay. Sure.

A. Yes, 7-21-05.

Q. Okay. What are you looking at?

A. This is like—what is it called? It's Cheryl's like list of rostered places, whatever.

It's like her employment or where we've sent her LEIF in the Lutheran system from when she started—like we have her starting in August 15th, 1993 out of Immanual Macomb, down to the last one was when we sent her to Lutheran Special Education Ministries.

Q. Okay. And the document we're looking at has a number in the top right-hand corner that's 201745 and it's titled Mrs. Cheryl S. White Perich. The first line is contracted to Macomb, Immanual, effective 8-15-93. (Preschool). Is that correct?

A. Correct.

Q. All right. So when we're looking at this form, it confirms what you were just telling us, is

* * *

[00027] Q. Okay. Why did you not provide Ms. Perich's name to any other schools?

A. Probably, after that fact, it's probably because of the termination from Hosanna-Tabor.

Q. Okay. Well, this is dated July 21st, 2005?

A. Right.

Q. All right. So it was because of her termination that she was no longer referred to as potential employment with other Lutheran Schools?

A. That's my guess.

Q. Well, when you say guess, why would you say I would guess? Isn't this something that you handle?

A. Yes, it's something I handle. But it's also three years ago and I'm not sure I can—you might have a

better memory than I do, but I don't always recur everything I was thinking three years ago.

Q. Did you get a report back from the Lutheran Special Education Ministries regarding hiring Ms. Perich?

A. No, but that's not unusual. We send them lists. Cheryl's name was on a list. And we usually don't hear back from them about the people on the

* * *

[00033] Q. When you're called, and I understand there's the religious implications and the like, is it essentially the same as a tenure?

A. It depends on the call itself. Every—like I'm on a three-year roll-over call. So when I get evaluated, if I get a good evaluation, I get a third year added. But it says that in my call papers.

So if it's not with tenure, it should say that somewhere in the call papers. Like one of the things that's happening lately is we're having nontenured one-year calls.

So you can be called without tenure. You can be called with tenure. My guess is Cheryl's call, from when it was, was with tenure.

Q. Okay.

A. Just because of the time frame of when the call was.

Q. So if a local congregation decides to get a different teacher and just they want somebody else better, what grounds are there for terminating that person's employment?

A. False doctrine, immorality, incompetence or inability to do the ministry. And the other one that's been happening a lot lately is reduction in [00034]

force, but then you usually don't hire someone in to take their place.

Q. All right. In this—in the situation of Ms. Perich and the termination of her employment, Hosanna-Tabor in fact replaced Ms. Perich, correct?

A. That's my understanding, yes.

Q. Did you have any involvement in that?

A. I'd have to check if we sent them a call list or not. But personally did I, besides that, no.

Q. Does the Michigan District have a relationship with Concordia?

A. College?

Q. Yes.

A. Yes. Well, they're across the street from us. So they're a Lutheran College, so yes.

Q. What is the scope of that relationship, other than being across the street?

A. Well, the college, the university trains—one of their courses of study is to train teachers and they train pre-seminarians, et cetera. So those teachers are going to student teach in Lutheran Schools in Michigan, some of them. Some of them are going to be hired by congregations in Michigan.

* * *

[00042] So if I believe that the Michigan District is efficient at reaching the lost, I give to that cause, to the Michigan District. That's why I do. Okay.

Q. There's a president of the Michigan District?

A. Correct.

Q. All right. Who does the Michigan District president report to?

A. If I had to guess, I'd say it's President Kieschnik down in St. Louis.

Q. Who's that, the—

A. He's the synodical president at headquarters.

Q. Is there similar organizations like the Michigan District throughout the United States?

A. There are 35 districts. Michigan is one of them.

Q. So if we look at their—try to describe the pyramid, we have the synod in St. Louis and then under that we have 30 districts?

A. 35 district.

Q. 35 districts. And then under those 35 districts are the local congregations?

A. There's one step in the middle.

[00043] Q. Okay.

A. There's circuits. Circuits are like regional gatherings of congregations, like anywhere from seven to 15. Like in the Redford area, that would probably be like Redford, maybe go up to Livonia. So there's circuits and then there's the individual congregations.

Q. So again, just to make sure we have it clear. We have synod in St. Louis. Then we have the 35 districts, the regional districts. Then we have circuits underneath that. And then congregations underneath those?

A. Correct.

Q. Alright. What relationship does the circuit have as to the local congregations under it?

A. There's a circuit counselor for each circuit that is kind of like available for expertise advice, if needed, if asked.

Q. Okay. Is the circuit that covers Redford, are they active?

A. As far as I know. I mean, that's ordained side, so I don't—ordained side is not my area of expertise, but I know that all the circuits meet regularly.

Q. Okay. What responsibility would the

* * *

EXHIBIT 4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed 07/15/08]

Case No. 2:07-CV-14124

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

v.

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,
Defendant,

and

CHERYL PERICH,
Plaintiff/Intervenor,

v.

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,
Defendant.

Hon. Patrick J. Duggan
Mag. Judge Steven D. Pepe

AFFIDAVIT OF CHERYL PERICH

1. I, Cheryl Perich, am the intervening plaintiff in the above-referenced lawsuit.

2. I began my employment with Hosanna-Tabor Evangelical Lutheran Church and School ("Hosanna-Tabor) in August 1999 as a contract elementary school teacher.

3. After I had completed the courses at Concordia College that are required to be eligible to be a called Teacher, Hosanna-Tabor hired me as a called Kindergarten Teacher, starting in August, 2000.

4. In June, 2004, I became very ill during a Hosanna-Tabor golf event, and I was hospitalized.

5. As of August 11, 2004, my doctors were not certain as to a diagnosis, and Stacey Hoeft informed me that I should take a disability leave and that my job would be waiting for me. As a result, I applied for disability benefits from Hosanna-Tabor's disability insurance provider and went on a disability leave of absence at the beginning of the 2004-2005 school year.

6. In December, 2004, my neurologist, Dr. Robert Spitzer, confirmed his diagnoses that I was suffering from narcolepsy, and he began the process of prescribing and adjusting my medications so that I can return to work in a fully functional state.

7. On February 9, 2005, School Board Chair Scott Salo called me to arrange a meeting. I told Scott Salo that I prefer to meet with the entire School Board because I had heard that Hosanna-Tabor wanted me to resign and because Stacey Hoeft had expressed doubts about my ability to return to work even though my doctor had told me that I would be able to fully function and return to work. Scott Salo later informed me that the School Board would meet with me on February 13, 2005.

8. On February 13, 2005, I attended a meeting with Hosanna-Tabor's School Board, President Jim Pranschke, and Principal Stacey Hoeft. At the beginning of the meeting, Scott Salo gave me a proposal asking me to resign from my employment if Hosanna-Tabor paid part of my medical insurance for a limited

time. I gave them a copy of my return to work slip, without restrictions, and I told them that I am fully able to return to work as of February 22, 2005. I also told them that I had no interest whatsoever in resigning from my position. Scott Salo asked me to reconsider my decision, and Jim Pranschke told me to email my decision to him by February 21, 2005.

9. During that February 13th meeting, Board member Kurt Ostrander told me to the effect that he "wouldn't drive if I were you, not even if the doctor says you can." Board member Sheila Simpson also told me to the effect that "I have a medical background and I know that you have to be without symptoms for at least three months before you can be sure that the medicine is working well enough that you won't have symptoms . . . . If I were a parent who has a child in this school, I'd want you to be without symptoms for 6 months, with no episodes for 6 months or maybe even a year before I'd want my child in your class."

10. I then informed the Board that rejecting my doctor's authorization to return to work would cause a real problem for me because I am no longer eligible for disability insurance coverage since I had been released for work and I am not disabled. School Board member Sheila Simpson responded to the effect that "all you have to do is call your doctor and tell him that your employer has a rule that you have to be symptom free for three months before you can return to work. He'll take his copy of the return to work slip out of your file and change things in his file to say that you can come back later. I know doctors. They work with their patients like that."

11. On February 14, 2005, I spoke with Jim Pranschke and told him that I thought it would be

against the law to ask a doctor to changes his records. Jim Pranschke told me that I should ask my doctor, and if he refuses, the School Board will still not change its decision to request your resignation.

12. On February 22, 2005, due to the requirements set forth in the employee handbook, I went to the school to report for work. I went to the room where the teachers met each morning before classes began. Stacey Hoeft, however, told me that I cannot return to work. Stacey Hoeft told me to go home, saying to the effect of "I'm not the only person that doesn't want you here. Parents have told me that they would be uncomfortable with you in the building." I was very uncomfortable about leaving the School with Stacey Hoeft's verbal statement that I should leave because of the employee handbook requirements. Accordingly, I asked Stacey Hoeft to put her instructions in writing to show that I had tried to return to work.

13. On the afternoon of February 22, 2005, Stacey Hoeft called me at home. I told her that I had been trying to work out the issues with you and the Board, but I had been talking to an attorney and intend to assert my legal rights.

The above stated facts are based on my personal knowledge, and, if I am called as a witness at trial, I am competent to testify as to these facts. I declare under penalty of perjury that the foregoing is true and correct.

_____

Cheryl Perich

Executed on: July 15, 2008

EXHIBIT 5

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed 07/15/08]

Case No. 2:07-CV-14124

EEOC,

Plaintiff,

v.

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,

Defendant.

and

CHERYL PERICH,

Plaintiff/Intervenor,

v.

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL

Hon. Patricia J. Duggan

DEPONENT:	STACY HOEFT
DATE:	Thursday, June 12, 2008
TIME:	10:00 a.m.
LOCATION:	Equal Employment Opportunity Commission 477 Michigan Avenue, Suite 865 Detroit, Michigan 48226
REPORTER:	Elsa Jorgensen, CER6600

* * *

[6] A. Is 11421 Arnold, Redford, Michigan 48239.

Q. Are you from Michigan originally?

A. I am.

Q. Okay. Where did you attend high school?

A. I went to Lutheran High in Westland.

Q. Where did you attend college?

A. I attended Concordia University in Mequon, Wisconsin.

Q. And where did you get your college degree? In what area?

A. Elementary education.

Q. Any education after Concordia?

A. I have 18 credit hours towards a master's degree at Madonna University.

Q. Is that in education as well?

A. It is.

Q. Okay. Now, you have appeared today pursuant to a subpoena you received; is that correct?

A. Correct.

Q. Okay. Have you met with anyone to prepare for your deposition today?

A. No.

Q. Are you married?

A. I am.

Q. And for how long have you been married?

A. Thirteen years this summer.

[7] Q. What does your husband do for a living?

A. He is a purchaser.

Q. Okay. Do you have children?

A. Two.

Q. And where are you currently employed?

A. I am currently employed at Living Word Lutheran School in Rochester.

Q. Are you the principal there?

A. I am

Q. And where did you work before you started working at Living Word?

A. I was principal at Hosanna-Tabor Lutheran School in Redford.

Q. And when did you leave Hosanna-Tabor?

A. I left in June of 2007.

Q. Okay. Tell us why you left.

A. I had another offer from Living Word, and I—we believe that we're called by the Spirit to the location that we serve, so I felt that I was being called by the Spirit to go to my new ministry.

Q. So did that opportunity come along before the end of that school year?

A. I was offered the position in May for the following school year. Our—when we get a new call, it takes—for principals, it starts as of July 1st. No matter [8] when you receive the call, you start the following July 1st.

Q. Okay. Even though the school year might not start until—

A. Right. You finish out that current school year that you're in, and then you start at your new position July 1st.

Q. Okay. And I want to back up for just a minute. When did you become the principal for Hosanna-Tabor?

A. I became the principal there in 2003, July of 2003.

Q. Did you work as a teacher or hold any other positions before that?

A. Yes. From '99 to 2003, I was a teacher at Hosanna-Tabor.

Q. While you were the principal for Hosanna, can you just tell us briefly what your main responsibilities were?

A. That's a good question. How do I put it into just a couple—well, I oversaw the staff and students of the school and also was a half-day teacher.

Q. Okay. So for half the day you were a teacher, and you also oversaw the operation of the school?

A. Correct.

Q. Okay. So is it fair to say that even though you did teach part of the time that you were an administrator [9] for the school?

A. Correct.

Q. Okay.

A. I could have been called out of the classroom at any moment for administrative issues.

Q. My understanding is that you were also an ex officio member of the school board.

A. Correct.

Q. And up to this point, it's on the record that you were on the board during the school year 2004/2005.

A. Correct.

Q. Was there any other school year in which you served on the board?

A. I would have been on the board the entire time I was employed as principal. That's one of the duties of the principal is to serve as an ex officio member of the school board and also of the board of directors.

Q. Okay. So you belong to both the school board and the board of directors?

A. Correct.

Q. Okay. Just so that I'm clear, if you could explain to me what your role was on the school board being an ex officio member versus, I guess, a voting member.

A. Right. Well, an ex officio member is just there as mainly as advisory. I did not have the opportunity to [10] vote, if there was an issue to vote on. But the board was run pretty much under me, but I was there

as advisory to the school board and to the board of directors, for that matter.

Q. And would you agree with me that some of the matters that came before the board dealt with policy and handbooks and things of that nature?

A. Correct.

Q. Okay. And also perhaps the decision to contract for teachers for a given school year, if the budget permitted?

MR. WARE: I'm just going to object as to what board you're referring to.

BY MR. WEAVER:

Q. I think I said school board. But the school board.

A. That depends on the nature of that position, because if it is a call—like I said, that we feel that that's something that's led by the Spirit—that the voting members of the congregation have to vote on that. The school board does not have the power to make that decision. If the person is contracted for a short period of time, the school board can make that decision.

Q. Okay. That's what I meant. I was referring to contract teachers.

A. Okay.

[11] Q. But thank you for clearing that up. And to the best of your recollection, how often did the school board meet?

A. Approximately monthly.

Q. But there were occasions in which the board might call a special meeting?

A. Correct.

Q. Okay. Approximately how many employees did you have in a given school year? And I'm referring to both the call teachers and the contract teachers.

A. Teachers would have been seven, including me.

Q. Okay. And what did the rest of the staff consist of?

A. We had a full-time secretary in the office, a part-time secretary in the office. Now, are we talking just the school, or are we talking the church and the school?

Q. For now, just the school.

A. Okay.

Q. Did you have any maintenance or janitorial staff?

A. We had—we had one full-time janitorial staff. That's all that can recall.

Q. And to the best of your knowledge, how many people were employed by the church?

MR. WARE: Objection. Foundation.

BY MR. WEAVER:

Q. Go ahead.

[12] MR. WARE: If you know.

THE WITNESS: The church would have employed a pastor and a church secretary.

BY MR. WEAVER:

Q. Okay. Do you know Cheryl Perich?

A. I do.

Q. Okay. She was a teacher at Hosanna; is that correct?

A. Correct.

Q. And do you recall the last school year she worked?

A. The last school year she worked was the 2003/2004 school year.

Q. Is it your understanding that she didn't return for the '04/'05 school year because she was on disability leave?

A. Correct.

Q. Now, you and Cheryl communicated regularly by e-mail while she was on leave?

A. Correct.

Q. Did you also talk on the phone during that time?

A. I talked to her a handful of times over the phone, but she indicated to me that her preferred method of communication was through e-mail.

Q. Okay. Do you recall towards the beginning of her leave period maybe asking her to, I guess, keep you abreast of her status while she was out?

A. Sure.

[13] Q. Okay. And sitting here today, do you have any idea how long she was on disability leave?

A. I don't recall.

Q. Okay. The '04/'05 school year is split up into two semesters; is that fair?

A. Sure.

Q. Okay. And she didn't return at all that first semester, correct?

A. Correct.

Q. And then I guess toward February of '05—we'll get into the details later—but there was an issue as to whether or not she could, and she made an attempt to do so in February of '05?

A. Correct.

Q. Do you have any knowledge or information about any medical conditions Cheryl may have had while on disability leave?

A. That was a confusing issue at the time. And from what my understanding is today, was that it ended up being narcolepsy, that the diagnosis was narcolepsy.

Q. Okay. And at some point, it was Cheryl who shared that with you?

A. Yes.

(Exhibit No. 7 marked.)

[14] BY MR. WEAVER:

Q. Okay. Ms. Hoeft, I'm going to show you what has been marked as Exhibit 7, which for the record is an e-mail from Cheryl to you dated December 16, 2004. I'm showing you this, because right now our topic is, I guess, your becoming aware of her having narcolepsy. And I just want to bring to your attention, I guess, the last sentence in the first paragraph indicates that as a result of her going through a series of tests. Do you recall reading this or receiving this e-mail?

A. Yes.

Q. If you'll note in the second paragraph, she mentions her physician stating that it might take two months to get the medication adjusted, and then I think at the very bottom she estimates she might probably come back to work in two to three months. Do you—did you read this entire e-mail?

A. Yes.

Q. Okay. So is it fair to say that probably as of this date you got confirmation as to what her most recent diagnosis was?

A. The most recent one, yes.

Q. Okay. Do you recall in January of '05, I guess, doing some reading or research on your own about the medical condition termed "narcolepsy"?

[15] A. Yes.

Q. And can you tell me what material you looked at?

A. I just looked it up on the Internet.

Q. Okay. I believe there was an e-mail from Cheryl where she offered to send you a pamphlet because her doctor told her some of the information on the Internet was somewhat outdated. Did you ever receive a pamphlet from her?

A. No

Q. Okay. Based on the material you read during that time, what did you understand generally about narcolepsy?

A. I don't recall.

Q. Is it fair to say that it's a disorder in which sleep—a sleeping disorder or an inability to remain conscious?

A. That's what I would assume it to be, yes.

Q. Did you keep—let me ask you this. Did you print out what you researched?

A. No.

Q. Okay. After being informed by Ms. Perich of her condition, did you inform the school board or the board of directors that she had been diagnosed with narcolepsy?

A. I had always been giving them updates on whatever the most recent diagnosis was, so I'm assuming that I had updated them on this as well.

[16] MR. WARE: Are you talking about the school board or the board of directors or both?

THE WITNESS: Both. Both of those boards expected me to come with a report back to them monthly as to what the situation was. And so since that was an expectation from them, I would assume that that would have been something that I would have reported to them.

(Exhibit No. 8 marked.)

BY MR. WEAVER:

Q. I'm going to show you what has been marked as Exhibit 8, which for the record is an e-mail from you to Cheryl dated January 25th, 2005. I asked you a minute ago about a pamphlet—whether or not Cheryl sent you a pamphlet on narcolepsy. And you said that

you hadn't received one, but this e-mail—in this e-mail, you are thanking her for the information on narcolepsy. As you read this, do you recall what information you received from her?

A. The only paperwork that I ever got from her came registered mail later after all of this was over. The only information that I would have gotten from her would have been things that she got that she sent me either in these e-mails or on the phone.

Q. Okay. So just sitting here today, do you know what it was about narcolepsy—about the topic of narcolepsy [17] you received from her?

A. Well, going back to this previous e-mail, she says, [as read] "Was my brief description that I gave you about narcolepsy several e-mails ago enough to help you understand what it is or would you like me to send a copy of the pamphlet?"

My response back to that was, [as read] "Thanks for that info that you gave me."

Q. Okay.

A. So that would have been all that I had received from her—

Q. Okay.

A. —was, like she said, the brief description that she gave me in the e-mails.

Q. Okay. Okay.

(Exhibit No. 9 marked.)

BY MR WEAVER:

Q. This is Exhibit 9, which for the record is an e-mail dated January 27th, 2005. It's from Cheryl and it's addressed to you. You can take a minute and read it and let me know when you're done.

A. I've read it.

Q. Okay. Did you receive this e-mail and open it?

A. I did.

Q. Okay. And obviously it's indicating that as a result of [18] her visit to her physician, Dr. Spitzer, that she is estimated to be able to return to work between February 14th and February 28th of 2005, assuming that her medication adjustments go the way as expected. With that being said, I want to bring another exhibit in dated the same day.

(Exhibit No. 10 marked.)

BY MR. WEAVER:

Q. Do you recognize Exhibit 10?

A. I do.

Q. This is an e-mail you sent in response to Exhibit 9?

A. Correct.

Q. Would you agree with me, in the first paragraph you kind of expressed some kind of surprise that she would be able to return at the time she said she expected to return?

A. Yes.

Q. Okay. Why was this your reaction?

A. Well, I think it says in the second sentence, (as read) "It was just a few days ago that you said that you were unable to complete your disability forms because of the illness," so it was a surprise to me that on a day that she said she couldn't fill out the forms because of the illness that she was indicating that she would be able to come in and take control of a classroom under these [19] same conditions.

Q. Okay. But she estimates being able to return probably a month or so from the date of this e-mail, if you look at Exhibit 9.

A. Yes.

Q. Okay. But—

A. She had given me estimates previously, though, and not ever lived up to that estimate that she had

been given or had reported to me, so it was, for me and for our school, difficult to say that for sure this was going to be true when this was the same kind of report that she was giving me back in, say, August. So it was a surprise to me that even though she had reported that that was a possibility, that she had reported possibilities similar previously.

Q. Okay. And those prior possibilities that you speak of, those situations dealt with her being diagnosed probably incorrectly.

A. Correct. And that was the indication each time. It was I finally have a diagnosis, and I'm finally going to have the correct medications so that I can come back and exactly like this sounded. So it was hard to say for sure if this was going to actually be the correct diagnosis or if this was just going to be one more in a string of misdiagnoses.

[20] Q. Okay. So at this point in time, January 27th, this was basically you expressed—this was basically you expressing some disbelief that she would be able to come back the following month.

A. It wasn't disbelief. It was surprise that, like I said, just days before she was unable to complete forms but then she was telling me that she was going to return to the classroom.

Q. Okay.

A. So I wouldn't say that it was disbelief, but it was surprise.

Q. You mention here a concern about her ability to be responsible for the safety of a classroom full of children. Is there anything in particular with respect to safety that you were concerned about?

A. Well, I was concerned that she wasn't able to complete forms because she was what she had been terming as passing out. So yeah, I was concerned that

she was going to be in a classroom full of children in—under similar circumstances.

Q. Okay.

A. And I had not received any information other than that.

Q. Other than the e-mail?

A. Correct. In saying that, you know—like it says, that she was unable to complete forms because she continued [21] to pass out.

Q. In the third paragraph of Exhibit 10, the last sentence, you indicate that you will pass this information along to the board of education and the board of directors. Did you indeed do that?

A. Again, I'm assuming that I did because that was my responsibility monthly to do so.

Q. Okay. Did—okay. When you conveyed this information about Cheryl to the board during this relevant time period, how was that done? Was it during meetings or—

A. Yes, it would have been during a meeting. We would have had an agenda item "Update on Cheryl Perich."

Q. Okay. And just for clarification because we mentioned two boards here, is your testimony about both boards after receiving this e-mail—or I'm sorry—sending this e-mail, Exhibit 10?

A. That I would have informed both boards?

Q. Yes.

A. Correct,

Q. I'm going to show you what was previously marked as Exhibit 1 in the last deposition. And for the record, this is Hosanna-Tabor's answers to the EEOC's first set of interrogatories. If you look at the top of the page, it lists a number of people who are represented to be the board members for the school year 2004 and 2005. To [22] the best of your recollec-

tion, were those the people who made up the board during that year?

A. To the best of my knowledge.

Q. Okay. Can you think of think of anyone who might not be listed there who was a member of the board that year?

A. No.

Q. Since leaving Hosanna, have you kept in contact with Mr. Scott Salo?

A. No.

Q. And how about Sandy Bryer? Have you spoken with her?

A. No, Scott Salo, just to go back to that, will send me an occasional forwarded e-mail, but that's the extent of the communication I've had with him since I left there. Sandy—I've not seen or spoken to since then.

Q. I don't know how you say his last name. Tom?

A. Oh. Pichan.

Q. Pichan. Have you spoken with him since you left Hosanna?

A. I have.

Q. Do you talk to him regularly?

A. I wouldn't say regularly.

Q. You have spoken with him, though?

A. Yeah, a number of times since I've left. He is a friend of mine.

Q. Okay. Have the two of you ever talked about this case?

[23] A. No.

Q. What about Kurt Ostrander?

A. Kurt lives in Minnesota now. I've not seen or spoken to him since he moved there, which I would say was almost two years ago, a year ago. I don't even remember now.

Q. Have you kept in contact with Sheila Simpson?

A. No.

Q. What about Jim Pranschke?

A. No.

Q. While were you the principal for Hosanna, were you also a member of the church?

A. I was.

Q. Are you a member of another church now?

A. I am.

Q. Okay. Are you now a member of Living Word?

A. I am.

Q. Okay. I'm going to show you what was previously marked as Exhibit 2 in the last deposition. For the record, these are the meeting minutes of Hosanna-Tabor's January 30th, 2005, annual shareholder meeting. Have you ever seen a copy of these minutes before?

A. I probably have. I'm not familiar with them right now, but I'm sure that I have.

Q. Okay. If you look at the second page, Item No. 12 at the top, it states "Proposals concerning our disabled [24] employees." In particular, I only want to direct your attention to subpart C, which pertains to Cheryl Perich. Do you see where I am?

A. Yes.

Q. Okay. It says, "Option 2 was approved by a majority vote, 35 to 8. A timeline will be established by the board at their next meeting in February." And I think Option 2 was later on in this exhibit, because it's an attachment.

A. Right, the last page.

Q. Yeah, the last page.

A. Uh-huh.

Q. If you look at the bullet points under Option 2 under the subheading "Reasons," I guess the fifth one down. Do you see where I am?

A. Okay.

Q. Which states, "Our school administrator and the school board feels it is very unlikely Ms. Perich will be physically capable to return to the classroom this year or next year."

Now, for clarification, the reference to administrator is—

A. Me.

Q. Okay. Great. Can you tell me, first and foremost, is this an accurate opinion of the board at the time of the [25] meeting?

A. I would say if that's what was written that's what was felt at the time.

Q. Okay. Was this opinion based on Cheryl's diagnosis with narcolepsy?

A. I would think that it was—this is guessing now—that it was based on the fact that, like I said, we had been given a report of diagnoses in a row of where she had reported that they had found a diagnosis and that she was going to be treated for it, and then it was a misdiagnosis and then it was something else and that it was not being resolved—

Q. Right. But—

A. —as was reported from her to me.

Q. Okay. But at the time of this meeting in January of 2005—I think we covered this earlier—her most recent diagnosis was narcolepsy, and she made some representation that she is going to get, you know, her medication adjusted so that she can return. So clear this up for me. Isn't it true that that was the last medical condition she shared with Hosanna as of the time of this meeting?

A. It would have been the last one, the most recent.

Q. So then I guess what I'm asking is, I understand that there were some misdiagnoses in the past, you know, [26] going back to August—

A. Correct.

Q. —of '04. But my question is, why is it—why was it the opinion of the board that going forward she couldn't come back that school year, 2005, or the following school year?

A. I don't recall.

Q. And did her having narcolepsy have anything to do with the board's opinion that she was physically incapable of returning?

A. I don't believe so.

Q. Okay. Why was it the board's recommendation, according to Exhibit 2, to ask Ms. Perich for a peaceful release from her call?

A. At this time—

Q. Yes.

A. —was based on the continued reports over the course of the year from her to me based on the fact that going back to the one exhibit that we had discussed about her not being able to fill out disability forms. This was on January 27th that she had reported that. And so, yes, she had indicated that she had hoped that she would be able to come back, but the past had not shown us that that was what was going to be true.

Q. Okay. So again, your answer is—the context of your [27] answer is about what had happened leading up to this point.

A. Correct.

Q. Okay. What medical information were you relying on to make the determination going forward for the next year and a half that she was physically incapable of returning?

A. We had no medical recommendation either way. We had it from her, but we did not have anything as far as medically from her doctor, from anyone, either way that she would or that she wouldn't. And at the time, she was currently considered to be disabled,

so to us, that was the medical recommendation, was that she was disabled at that time. So until we received information from her doctor stating otherwise, there was no—there was no other assumption we could go on.

Q. Okay. But given—I'm going to take your words. You were making this assumption, but it wasn't supported by any medical information at the time?

A. No.

Q. At the time of this meeting, was it the board's opinion that the possibility of Ms. Perich passing out should she return—did that have anything to do with the board's opinion that she couldn't teach a classroom full of kids?

[28] A. I'm sure that there was concern about that.

Q. If you look at the first bullet point under "Proposal" on the last page, which I guess is recommending the congregation—to let the congregation offer to cover Cheryl's benefits through December 2005 in exchange for a peaceful release from her call. Was that something that you, in part, came up with?

A. That I personally came up with?

Q. Well, that you participated in coming up with or presenting to the congregation.

A. I don't recall.

Q. Okay. But to the best of your recollection based on what is stated here, was it proposed that that coverage be offered in exchange for the release of her call?

A. If that's what is here, that's what would have been discussed at a board meeting, which I was required to be at, so I would assume that, yes.

Q. Okay. One other question. Before the shareholder meeting on January 30th, can you tell me whether or not the school board met—members met amongst themselves prior to the shareholder meeting?

A. I don't recall. That was not typically our practice, but I don't recall.

Q. Going back to Exhibit 2 on the last page, it mentions the intent to search for a replacement once a peaceful [29] release of Cheryl's call was received. At that time, did the board have anyone in mind to replace her the following school year?

A. No.

Q. And at that time of the shareholder meeting, it's my understanding that a teacher had been contracted to finish the rest of that school year, '04/'05.

A. Correct.

Q. And do you recall who that was?

A. I believe that was Liz Gavrun.

Q. Okay. So the school board was proposing at the shareholder meeting that for all intents and purposes that Hosanna seek a resignation from Ms. Perich?

A. At that time to free up the remainder of that year.

Q. The remainder of the '04/'05 school year?

A. Correct

Q. All right. But when you say to free up the remainder of the year, I'm not clear on something. Because there was already a contract teacher in place to finish out that school year?

A. Correct. Whom we would have liked to call, but, because that call had already been assigned to Ms. Perich, we could not assign that to anyone else.

Q. Okay. So had Ms. Perich asked for a peaceful release from her call, you would have called Ms. Gavrun?

[30] A. Could—could have called, yes.

Q. Okay. Was that being considered? Calling Ms. Gavrun?

A. To my knowledge, yes.

Q. Okay. Was there a meeting between Cheryl and the school board in February to discuss her employment status?

A. Yes. It was on my birthday.

Q. Oh, February 13th.

A. Yes, sir.

Q. Okay. Are all of the members required to be present at board meetings?

A. Yes.

Q. And at this meeting, did Cheryl present a note from her doctor clearing her to return to work?

A. Yes, she gave us a photocopy of a note.

Q. A photocopy of a note?

A. A photocopy of a note from her doctor, just to make that clear.

Q. Okay. Was the—was it typewritten or handwritten?

A. It was handwritten on, like, a prescription pad.

Q. Okay. And to the best of your recollection—what?—it just stated in a nutshell that she could return to work?

A. Yeah, to the best of my knowledge.

Q. Okay.

A. I haven't seen that recently.

[31] Q. Did it, by chance, mention that she had no restrictions at that time?

A. Not to my knowledge.

Q. Was Ms. Perich's narcolepsy discussed at some point during the meeting, or her condition?

A. Yes.

Q. Okay. Do you recall what was stated about her having narcolepsy, at the meeting?

A. I don't recall.

Q. Is it fair to say that the board was uncomfortable with the doctor's note which authorized her return to work?

A. Uncomfortable with the note?

Q. Yes. With what was stated in the doctor's note.

A. I think that the board would have liked to see some more information about it, rather than just the note. I think that it would have made them feel better about it. There was no education on the disorder at all, so there was—there was, I would say, a feeling of being uncomfortable because there was—there was an unknown.

Q. There was an unknown?

A. The condition was something that no one had any experience with and really didn't know anything about, and so the only thing that was provided to us was a note—a return to work note, and I think that it would have probably helped the board to have a little more [32] education on the condition itself.

Q. Okay. And a little more information from the doctor?

A. If that's the way it could have—you know, if that's the way the education could have come forward, yeah. I mean, we were talking about her going into and being responsible for a classroom full of children. It wasn't that we were asking her to go and sit at a desk in an office. We had, you know, a classroom full of children, and their best interest is our best interest.

Q. Okay. At the time of the board meeting, was the school board concerned about whether or not, you know, Cheryl would be able to keep from passing out or remain conscious?

A. I'm sure that there was some concern about that. That was what had been reported from her. And, again, without any other education on the condition, I'm sure that that was a concern.

Q. Okay. Was her—did Cheryl, by chance, mention that, you know, the symptoms were under control by

medication and she could resume normal activities, during that meeting?

A. I don't recall.

Q. Did Mr. Ostrander say during the meeting that Cheryl shouldn't be driving regardless of what the doctor said?

A. I don't recall,

[33] Q. Okay. Did Ms. Simpson mention or say to Cheryl that people were concerned about her being in the building with her condition?

A. Again, I don't recall.

MR. WARE: I'm going to object to passing notes between counsel. If Mr. Roach wants to ask questions, he can ask them when it's his turn. I mean, you're not letting me ask her questions. Can I pass him some notes?

MR. ROACH: Sure. Feel free. You're able to do so.

MR. WARE: I mean, you take enough time when you do yours. So if you're going to do one deposition, that's fine.

MR. ROACH: Okay.

MR. WARE: But I haven't interjected with any questions that I have. Can we take a break?

MR. WEAVER: Well, before we—

MR. WARE: If you two want to consult, let's go off the record, I mean, so I can go feed my meter or something.

MR. WEAVER: Before this gets out of hand, I think that the objection is kind of pointless, because, you know, Mr. Roach could easily, you know—

MR. WARE: Take over your deposition.

* * *

[38] It had nothing to do with the disability. It was wholly on the policy of there was no position to return to for the remainder of that year and that she had had an opportunity to object to that at the time that we hired someone, but she never did. She—in fact, it was quite the opposite. She was helpful, and you can probably see in some of those e-mails that she had offered up, you know, help and advice for this new person.

Q. Okay. I understand that there was also another—I understand that that was discussed at the meeting as well, and—but before I move on to that, you know, I just—I'm just going to have to ask you directly whether or not you said to Cheryl that she hadn't been on her medication long enough or that only a short time had passed since the last time she passed out and therefore she couldn't be responsible for a classroom full of kids.

A. I don't believe that I would have said that, because that's not my determination to make.

Q. Okay.

A. I'm not a doctor, and I don't know how long it takes for medication to work.

Q. You mentioned a minute ago that you took the position that a contract teacher had already filled in for Cheryl [39] the rest of the year.

A. Correct.

Q. That was—was that the position of the entire board at that time, in terms of whether or not she could return as a teacher?

A. For the remainder of that school year?

Q. Right.

A. Yes.

Q. And with that being said, didn't Cheryl ask about her chances or inquire about returning the following school year?

A. I don't recall. If she did, I can tell you what my response would have been, and that would have been—and this would have been every year in February—in that we have such a small enrollment that we cannot make that determination at that time of the year. We would have told her that if there was that position available that she would have been considered for that position.

However, I could not promise her that sitting in that meeting that day, because I didn't know that we would have had that class—would have had a teacher for that class. We—there are years where we eliminate positions wholly and combine classes and have one teacher teaching two up to three grades in one classroom.

[40] So I would not have made a promise. The board would not have made a promise in February at that time that there would have been a position available, but I believe that we would have said that if that position was available that she would be considered for it.

Q. Okay. Is it your—I mean, I just—because I don't want to put words in your mouth. Are you suggesting that at that meeting that she asked for a promise that she could come back next year?

A. Yes.

Q. She did that?

A. She did. She wanted us to promise her that there would be a position for her in the fall. If—if she asked for her peaceful release, that we would promise that she would at least have her job back in the fall.

Q. Okay. Well, that's a little confusing. Because I think a moment ago when I brought up the issue of her returning in the fall, you said you didn't know if it was discussed—

A. Okay.

Q. —but this is probably what would have happened at the meeting.

A. Right. And now, thinking and talking back through it, I can recall that that was asked from her. And our response back to that, though, is what I'm saying I'm [41] assuming that our response would have been to that request

Q. Okay. So you recall her asking for a promise, but you're assuming what the response would have been but don't quite recall the response?

A. Well, I can't recall word for word what that response would have been, but that would be my response every year to a teacher who wanted a promise of a job in the fall in February. My response—our board's response to a person, a teacher, who wanted that promise for the fall that wouldn't—we would never have given that.

Q. So correct me if I'm wrong, but at some point before that meeting ended, the board wanted Cheryl to consider giving a—peacefully releasing her call?

A. Correct.

Q. And that—okay. Which is tantamount to a resignation?

A. Correct.

Q. Okay.

(Exhibit No. 11 marked.)

BY MR. WEAVER:

Q. Okay. For the record, you have been handed Exhibit 11, which is an e-mail from Cheryl to you dated February 21st, 2005, in which she states she decided not to ask for a peaceful release and indicates an intent to return to work the following day, February 22nd, 2005. [42] Did you read this e-mail on February 21st?

A. No, I did not.

Q. At what point did you read this e-mail?

A. I recall reading that e-mail sometime in the afternoon of February 22nd.

Q. Okay.

A. This was sent at 9:00 at night, and I don't usually check my e-mail that late at night

Q. Was this sent to your work e-mail address or your personal e-mail address?

A. Correct, my work e-mail.

Q. You said you read it on the afternoon of February 22nd. Let me jump back for a minute. Cheryl reported to the school on the morning of February 22nd, 2005?

A. Correct.

Q. Okay. And did she—she reported to work by coming to your office?

A. She came to the room where we every morning met as a faculty to have morning devotions. I was not present when she arrived.

Q. Okay. At some point, you arrived later to the room where the faculty met?

A. One of my children was ill that day, and I was planning to be at home with my child. And I had gotten a call from one of my faculty members to say that Cheryl was [43] there. And so I arrived—I don't remember what time it was, but it was that morning. After I received the call, I threw on clothes and headed up to school.

Q. Okay. And when you got to the school, what happened?

A. I asked Ms. Perich to come to my office at which time—

(Someone sneezing.)

A. God bless you—she stated that she was not going to leave unless I gave her documentation stating that she had to leave the premises.

Q. Okay. Before she made that statement, did you ask her to leave the premises?

A. I asked her why she was there, when on the 13th when we had met, we had basically told her that, according to our policy, there was no position for her to come back to this year. And that was when her response was she was not leaving until she was given written documentation that she had to do so. And that she had, you know, informed me, and at that time, I had not been—I was not aware of this e-mail being in my inbox.

Q. Okay.

A. So I found that to be wholly insubordinate that she found that her form of communication to her superior to return to work after nine months of not being in the building—that her way of notifying me would have been [44] at 9:00 at night through my work e-mail.

Q. Okay. But that morning she mentioned to you, "Well, I did send you an e-mail last night"?

A. Right.

Q. Okay. And you eventually—correct me if I'm wrong—gave her something in writing?

A. I did.

Q. Okay. Did Cheryl explain to you why she wanted something in writing stating that she reported to work but was told that she could not return?

A. No. She just said she was not leaving until she received that written notification.

Q. If you look at Exhibit 11, it mentions that—it mentions her note from her doctor. I want to show you a doctor's note and ask you if you have seen it.

(Exhibit No. 12 marked.)

BY MR. WEAVER:

Q. Exhibit 12, have you seen that?

A. I have never seen this.

Q. Okay.

MR. WARE: I have never seen this either.

BY MR. WEAVER:

Q. But there was a note that was presented to the board at the meeting, correct?

A. Yes.

[45] Q. Okay.

A. The form that I stated previously.

Q. Right.

A. Photocopied prescription pad note.

Q. Well, we'll just continue our discussion with—based on the note that you did see at the board meeting, I believe you stated earlier that in that note Cheryl's doctor said she could return to work. Do you recall if there was a particular date of her official return to work in that doctor's note?

A. I don't recall.

THE WITNESS: Can I see a copy of that?

MR. WARE: That's what he just gave you.

THE WITNESS: No—

MR. WEAVER: No—that's all right.

THE WITNESS: —of the note she gave us.

MR. WARE: If you want a copy, he has to give it to you. It's his deposition.

MR. WEAVER: For the record, I'm just going off of everything that I have.

MR. WARE: A lot of times—a lot of times attorneys want to test your memory so they're not—they don't really want you to have copies.

THE WITNESS: Okay.

MR. WARE: So they control what they want you [46] to have. I can't just hand you stuff.

THE WITNESS: Okay.

BY MR. WEAVER:

Q. Okay. And let me just respond to that by saying that I don't have this note in my sleeve hidden anywhere.

A. That was turned over—

MR. WARE.: That was—

BY MR. WEAVER:

Q. I'm sorry?

A. That documentation would have been turned over from me as included with all of these e-mails.

Q. Turned over from you? What do you mean?

A. When all of this documentation was requested.

MR. WARE: You're talking about to the EEOC. That was—

THE WITNESS: Correct

MR. WEAVER: Okay.

(Exhibit No. 13 marked.)

BY MR. WEAVER:

Q. All right. Okay. I'm going to show you what has been marked as Exhibit 13. Is that the note you've seen?

A. Yes.

Q. And for the record, it's a note from Cheryl's physician, Dr. Spitzer, which is handwritten, and it indicates a return-to-work date of February 22nd, 2005.

[47] A. Correct.

Q. Okay.

MR. ROACH: When you have a good chance for a break, let us know.

MR. WEAVER: Okay.

BY MR. WEAVER:

Q. So as of the time you received this note, at least according to the doctor, the recommended return date would have been February 22nd, 2005?

A. Correct, according to the doctor.

Q. I'm going to show you what has been marked as Exhibit 4 in the previous deposition.

A. Okay.

Q. This is part of the handbook.

A. Correct.

Q. I want to direct your attention to the second page of the handbook pertaining to medical leave in Item 2—

A. Okay.

Q. —where it states, "Failure to return to work on the first workday following the expiration of an approved leave of absence may be considered a voluntary termination."

Did you understand that provision to be in existence during the '04/'05 school year?

A. Sure.

[48] Q. Okay. Given that Cheryl gave Hosanna prior notice that her doctor released her to return to work on the 22nd, had she not done so, couldn't she—couldn't there be a chance that she would be deemed a voluntary termination for not reporting to work?

A. I would take that to mean if that was when she was expected to return to work that is not—I mean, that was when her doctor said she was okay to return to work, but that's not when we expected her to return to work.

Q. Okay. But wouldn't it be reasonable for an employee to want something in writing from her employer that she can't come back to work, to cover herself in light of this provision in the handbook?

A. In writing how? Like when she said she wouldn't leave without the documentation?

Q. Yes.

A. Sure.

Q. Okay.

A. My—my point on that was that she had shown up just to get that note. She did not show up, in my opinion, that day to work.

Q. But she never said that she didn't show up to work?

A. Correct.

Q. She didn't say to you, "I'm here just to get the note," did she?

[49] A. Well, she didn't say that she was there to work either. When I asked her, "Why are you here?" she said, "I am not leaving until I have documentation otherwise."

Q. But that was her response to your request that she leave?

A. That was in response to me asking her why she was there, when on the 13th she had been told that there was no position for her to return to until the following year at least.

Q. But again, in light of the provisions in the handbook, you didn't think it was unreasonable for her to at least cover herself and not be deemed a voluntary quit?

A. Correct. And that's why I gave her the documentation.

Q. Before giving Cheryl the letter, did you speak with anyone or contact anyone to get advice or guidance?

A. I called our superintendent of schools, the Michigan District Lutheran Schools, Bruce Braun, and asked him. I told him that she was there and that she wanted the letter, and he said go ahead and give her the letter.

Q. Okay. And what else did you discuss with Mr. Braun?

A. That was it. That was all I asked him was should give her the letter or not.

Q. Okay.

(Exhibit No. 14 marked.)

MR. WEAVER. Okay. Let's go off the record.

[50] (Recess taken from 12:09 to 12:36 p.m.)

BY MR. WEAVER:

Q. Ms. Hoeft, I'm going to show you what has been marked as Exhibit 14. Do you recognize Exhibit 14?

A. Yes.

Q. Is this the letter that you gave to Cheryl on the morning of February 22nd, 2005?

A. From what I recall, yes.

Q. And was this essentially the letter she was requesting that morning before she would leave the school?

A. Yes.

Q. I notice that it has two signatures on it. I'm assuming that the one at the bottom is your signature.

A. Correct

Q. And the one up top is the signature—do you recognize that to be the signature of Mr. Salo?

A. Yes.

Q. Was Mr. Salo already present at the school when Cheryl got there, or did he show up at a later point in time?

A. I don't recall. But his wife was a teacher on our staff, and it was common that he would drive her in to work. So whether he—you know, whether he arrived previous to her being there or afterwards, I don't recall. I don't recall.

Q. Okay. I want to jump back for a minute to the [51] conversation between you and Cheryl that morning. Was Mr. Salo present at that time?

A. Not that I recall.

Q. Okay. Well, the first sentence obviously indicates a request that Cheryl continue her leave, according to this exhibit, to allow the congregation a chance to develop a plan for her possible return. Let me ask you this. Was this the first written notification to Cheryl that—you know, to say, "Hey, you're still on leave until we say otherwise"?

A. From what I recall.

Q. And the first sentence also obviously notes the intent of the congregation to plan for her return. At the time of this letter that morning, was it really the intent for Hosanna to plan out Cheryl's return?

A. I—for her to return that year, I don't believe so.

Q. Okay.

A. But her possible return ever?

Q. Yeah, the following year, that year. I want you to just basically explain that to me.

A. Right. That's what I—from what I can recall, that was the thought that was in my head when I was writing this up was that, you know, we would discuss when she would be able to return.

Q. Okay. Okay. The next sentence reads, "The [52] congregational leaders will attempt to meet this evening to develop this plan."

Given that you wrote this letter, what did you mean by "congregational leaders"?

A. That would have been Mr. Salo, as the school board chairman, and I and possibly anyone who would have been on the board of directors at the time. They would have been considered the congregational leaders.

Q. Okay. So we're talking the board of directors, yourself, and Mr. Salo?

A. Right. Which we would have been members of the board of directors.

Q. Okay.

A. But given the short notice, I can't say who would have been able to, you know, attend that meeting.

Q. Okay. But at the time you wrote this letter, was it understood that a meeting was going to happen later that night?

A. It was—that was my plan, was to call a meeting for that evening. There was not a meeting scheduled, but at the time that I was writing this letter, I was letting her know that we were not just saying leave and well think about it but that we were going to, in fact, you know, attempt to meet that evening to discuss it.

Q. Okay. And was there, in fact, a meeting later that [53] evening?

A. I don't recall.

Q. Well, given what you state here, did the board meet at any point in time after Cheryl showed up on the morning of February 22nd, 2005?

A. I believe we did, but what day that was, I have no recollection. I mean, obviously we met again, because, you know, this issue continued. It wasn't that we just walked away from it as of that day. But when that was, I have no recollection.

Q. So is it fair to say that after Cheryl got the letter, that she left at that point?

A. Yes.

Q. Okay. Did the two of you have a conversation on the phone later that afternoon?

A. I believe we did.

Q. Okay. I'm going to show you what has been previously marked as Exhibit 3, and maybe you can clear this up for me. You mentioned earlier that you provided documents and information to the EEOC during the investigation.

A. Correct.

Q. Is this the—did you prepare this timeline of events?

A. I did based on the information in her personnel file and conversations that we had had, but this was prepared by me.

[54] Q. Okay. If you look at the last page of Exhibit 3, the second full paragraph, I'll let you read it and we can talk about it.

A. The paragraph starting "that evening"?

Q. "Later that afternoon."

A. Okay. Okay.

Q. Okay. So going back to our discussion, you said you and Ms. Perich had a conversation in the—on the afternoon of February 22nd, 2005?

A. Yes.

Q. And who initiated that phone call?

A. I don't recall, I believe that I called her.

Q. Okay. For what purpose?

A. Well, that morning when she was there, I could tell that she was upset. And I was upset, and I wanted—up to that point, I felt that I had been working as an advocate for her with the board. And I felt that when she left there were things left unsaid, and I wanted to give her the opportunity to discuss that with me.

Q. Okay. So you were giving her an opportunity to state her position in addition to state something she hadn't already said at the point?

A. Well, the last time we had met was on the 13th, and at that time, it had been, you know, requested that she request for a peaceful release, and until the 21st, we [55] were not aware that she was not going to do that.

And so the morning of the 22nd, when I got the phone call to go back up to school because she was there, you know, she appeared to me that she was upset. And I didn't feel—like between the 13th and the 21st, there was no indication to me that that was her stance on it. And so I wanted for her to be able to tell me what the reason—again, what was the reason for her, you know, to come that morning when we had already discussed it on the 13th and to talk to me about what—before I went into the meeting with the board—like I said, my intent all along was to work as an advocate for her. And if I was going to meet with the board that evening, I wanted to be able to go to the board on her behalf if she had something that hadn't already been said.

Q. Okay. What, if anything, did she say that you didn't already know before your phone conversation?

A. I don't recall. Honestly, I don't recall. I recall that it was a very emotional conversation, that it was a very long conversation, that I was at home when the conversation took place. I was not at work, because, like I stated before, one of my children was ill, and so I made that call from home. And that I was surprised at her—previous to this conversation, she was friendly. [56] And then that—as of that conversation she, you know, basically said, You're going to give me this job back or I'm filing a lawsuit.

Q. Okay. Which leads me to my next question or about the next sentence, which indicates that you're representing in Exhibit 3 that Cheryl said that the only thing that would satisfy her was to have her job back or that she would be filing a lawsuit for discrimination based on her disability.

A. Right. And I remember being very surprised at that, because that was not the issue going up to that moment, that—when she said that, I remember making her repeat that. I remember asking her, Okay. I need you to repeat what you just said that you really mean—that—because in our line of work, we have—we have a conflict resolution policy through our synod, and none of those steps had been taken. And according to our conflict resolution policy and because of the Christian nature of our work, we don't file lawsuits against each other.

And so for her to jump over the conflict resolution policy of the synod and go straight to "I'm filing a lawsuit" is very, very much against what is expected of us as church workers when we sign on with our call. And so I was surprised that that was—that [57] that was right where she went to. And I asked her to repeat herself. And that's exactly what she said in very much matter-of-fact this is what I'm doing.

And I said I just want to make sure that I understand this, because this is what I'm going—this is the information I'm going to take to the board tonight, and if you are telling me that we have to give you your job back now or you are going to sue us, I want to make sure that I say this right when I go to the board tonight on your behalf.

Q. Okay. But it doesn't state in this paragraph that we're discussing that she wanted her job back teaching her class during the school year—during that

current school year. So I guess, do you recall the context? I mean, was it that she wanted to eventually return once the contract teacher's contract was up? Or did she say, "I must have my job back. Kick this contract teacher out and give it to me"? She didn't say that, did she?

A. I don't recall. But I—from what I can recall, that—I don't recall the specific words that she used, but that was the feeling that I can recall getting that day. Because in my mind, I really felt like there was—there was that opportunity for the fall. Again, I was not going to promise it, because I—there was no way I could promise that for anyone. However, I [58] remembered feeling that that was what she was saying, that she wanted her job back right then in that classroom at that time. That's what I can recall. What words she used, I don't remember.

Q. Okay. So if I understand your testimony, you don't remember the words she used, but that was your impression.

A. Correct.

Q. Okay. Well, if you look at your last sentence, it states, "Ms. Perich asked Ms. Hoeft to inform the school board that if she wasn't given the opportunity to return to work that a lawsuit would be filed." You used the phrase "return to work." Correct me if I'm wrong, but wasn't there some discussion between the two of you as to whether or not she could do other things working for the school, if not return as a teacher?

A. She did write that up in an e-mail, but she knows that given the budget that we had at our school that we were not in a position to be able to hire someone to do extra things that she was—the extra things that she was suggesting.

Q. Okay. And I get that. But I guess my question to you is, based on the suggestion she gave you via e-mail about other things she could do, it would seem that she understood that somebody was already contracted to [59] finish the rest of the school year in her place. Isn't that what led to the other ideas?

A. Well, what she was asking then was for me to make up a position for her to return to, because there was no position for her to return to. That, yes, she did understand that there was not a position for her to return to but that she wanted me to make up a position for her to return to.

Q. Okay. Okay. So she wanted to return to work, period, not necessarily to slide into the place of the contract teacher. She just wanted to return to work.

A. That's what she indicated in the previous e-mail. But during this conversation, I understood her to be saying to me—the impression she gave to me was that all of that was out the window and she was done with all of that and this is what she wanted, was to come back to her job.

Q. Okay. And so after she indicated that she would file a disability discrimination lawsuit if she could not return to work and—did you inform—you told her then, if I understand you correctly, that you would relay this message to the board?

A. Correct.

Q. Okay. And was there a board meeting that evening?

A. From what I see in the notes, there was.

[60] Q. Okay.

A. I don't recall, but I can see that that's what's stated in the notes.

Q. And just for clarification purposes, we are talking about which board?

A. The school board—

Q. Okay.

A. —from the notes.

Q. Okay. Because earlier, you mentioned the board of directors and I just don't want—

A. Right.

Q. —to get confused.

A. From what I can recall, at that meeting it would have been the school board and our congregation president who is the leader of the board of directors. So it would have been almost a combined meeting, but there would have been other board—like, we wouldn't have had the board of trustees guy there.

Q. Okay.

A. So it would have been almost like a combination meeting with the majority of the people being there from the school board.

Q. And the congregation president at that time was Jim Pranschke?

A. Correct.

[61] Q. And so you informed the board about your conversation with Cheryl?

A. Correct.

Q. Okay. And what was the—was there a decision made or a reaction as a result of what the board learned?

A. Well, the board felt that—like I had stated before, that she was not following the guidelines set out for called workers for a conflict resolution, and that if that was her determination, that based on the requirements to be a called teacher that her job would, in fact, be terminated based on her actions from that day.

Q. Okay. In particular, her decision to take legal action versus go through the conflict resolution process?

A. Correct.

Q. Was there anyone on the board, either a voting member or ex officio member, who made the recommendation to start a process to terminate her employment?

A. I don't recall who that would have been.

Q. But there was a general consensus that that is what should transpire because of Cheryl's threat to file a lawsuit?

A. Well, it wasn't necessarily that. It was because of a violation of her—what she had agreed to when she took her call. And that, like I said, as called teachers, we

* * *

[86] believe her—

MR. WARE: This has been asked and answered about 15 times. And all you can do is indicate you have answered the question.

MR. ROACH: No.

MR. WARE: You keep asking and answering the same question.

MR. ROACH: Are you instructing the witness not to answer?

MR. WARE: Yes, I'm instructing her to answer that she has already answered the question 15 times.

MR. ROACH: You cannot—you can object. You can object all you want. You cannot instruct the witness to not answer.

MR. WARE: Okay. I'm just telling you you've asked and answered the same question over and over and over again, which is improper.

MR. ROACH: Objection noted.

MR. WARE: Okay. Which is improper.

MR. ROACH: Thank you. Your objection is noted.

MR. WARE: So you're not going to bully through the deposition. I'm telling you it's improper. You don't care. Then I'm going to do stuff that's improper, because I've told you both of you before about [87] things you're doing that are improper for a deposition taken under the Federal Rules of Civil Procedure. It's improper.

MR. ROACH: Are you done?

MR. WARE: Yes.

MR. ROACH: Thank you.

BY MR. ROACH:

Q. Do you remember my question?
A. No.
Q. Okay. When you received this e-mail from Ms. Perich to you dated January 27, 2005, did you not believe what Ms. Perich was informing you as to what her doctor said?

MR. WARE: Objection. Asked and answered.

THE WITNESS: It was not that I did not believe her, but up until now, she and she still, even on this day, these are her words. These are not her doctor's words.

BY MR. ROACH:

Q. Okay. And we already discussed that you had not requested any information from her doctor's office, correct?
A. Correct
Q. All right. In fact, during that February 13th, 2005, meeting, when Ms. Perich brought a copy of her return-to-work slip from her doctor, the school board

[88] and yourself did not believe that she, in fact, was able to work, correct?

A. It was not that we did not believe her, and I think that I already testified about that meeting and what I believed to be the impression that I got from that meeting.

Q. You received a note from a doctor's office.

A. Correct.

Q. The doctor's note says Ms. Perich is fine. She can return to work.

A. Correct

Q. There is no restrictions.

A. Well, it didn't say that, but—

Q. There are no restrictions on that, correct?

A. Correct.

Q. All right. So why not accept it?

A. I said I've already testified to the fact that that day at that meeting my position on that and I can only speak to my position—is that I went into that having no—this had nothing to do with her—whatever the diagnosis was had nothing to do with her doctor saying she was able to go back to work. It had to do with there was no position for her to return to work to, and that it was not going—she was not going to be able to return to work, whether her doctor said she was [89] able to or not, and whatever conversation went on with other people or whatever happened that day, that the fact was there was no position for her to return to at that time.

Q. Okay. This contract with Ms. Gavrun, is it a contract for a term of or a time or period?

A. To June 15th.

Q. All right. Does it say that during the contract?

A. Yes.

Q. What happens if the school decides to terminate the contract prior to that time?

A. It would—probably the school board would have to go back through—what would happen? I can't tell you. The school board would have to go back. They would have to vote on taking back that—that contract, and then I would probably be sitting in a conference room with her right now.

Q. When was the time or when was the decision made—what time—of to contract with Ms. Gavrun?

A. I don't recall.

Q. Is the contract an at-will contract?

A. Are all Michigan contracts at-will? I don't know.

Q. Do you know what that means?

A. It means that an employee can be released for any reason from the employer or the employee—

EXHIBIT 6

—Original Message—
From: Stacey Hoeft
To: CHERYL032155@msn.com
Sent: Wednesday, August 11, 2004 11:21 AM
Subject: school

Cheryl,

I thought an e-mail may be a better way to communicate right now since I've tried to call you both yesterday and today and your phone is busy. I had the chance to talk with Pastor about your recent illness. He/we will keep you in our prayers. We are very concerned about your health for so many reasons. We, of course, want you to be healthy – your family needs you. We're also concerned because your students also need you. I'm concerned that your class would be somewhat effected by witnessing your illness. Also, I don't want them (and their parents) to – wonder from day to day who their teacher will be. We don't want to have to scramble to get someone to cover for you on a regular basis. I will have more time at school this year as I will be working full time five days a week. However, I have already committed to doing so many things around the building and elsewhere that I am not really a reliable substitute either.

All things considered Pastor and I feel that it would be best for you to apply for disability at this time. I have already discussed it with Mr. Kraus and he was going to do some initial research for you. We want to make it as easy as possible for you. This way you can work on getting better and we have things covered for you here as you recuperate and you continue to

receive a paycheck and benefits which I know is so very important at this time.

I've already discussed this possibility with Andrea and she is prepared to teach 2, 3 and 4 for as long as she has to. It's only 19 kids so far. We'll present this idea to the parents soon so they aren't blindsided. I just want to wait until I've heard from you. I don't want you to feel like I'm trying to push you out. You still have a job with us we just want what's best for you and for our students.

Please e-mail or call and let me know what you think about all this. Of course, your doctor will have to work with you to fill out paperwork. Proper coding is essential for qualifying for a disability. I'm sure he'll know what to do and I'm also sure that he will agree that this is what's best for now considering that you could be injured and also cannot drive. We love you and we're thinking and praying for you. God's blessings.

Stacy J. Hoeft
Principal
Hosanna-Tabor Lutheran School

email: shoeft@hosannatabor.org
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Stacy Hoeft

From: CHERYL PERICH
[CHERYL032155@msn.com]
Sent: Thursday, August 12, 2004 8:29 PM
To: Stacy Hoeft
Subject: Re: school

Stacy,

I tried to call you a couple times since reading your e-mail message. It's so much nicer to actually talk to you, instead of sending you a note. I guess we both had the same problem (with communicating by phone).

After I received your message, I called my doctor. He was gone, for the day, but I talked to his nurse. She said that she'd talk to him tomorrow and call me back. I will let you know what he says as soon as I find out.

Thanks for your prayers (and Pastor's prayers). Imagine after praying for Pastor for so long, now he's praying for me! Well, maybe these prayers will be answered soon and I'll be back teaching at HT. I'm really looking forward to that.

Cheryl

EXHIBIT 7

Stacy Hoeft

From: CHERYL PERICH
[CHERYL032155@msn.com]
Sent: Thursday, December 16, 2004 11:26 PM
To: Stacy Hoeft
Subject: Dr. Appt. – Test Results

Stacy,

I tried to send you an e-mail yesterday, after my Dr. Appt., and several times today. I couldn't get an internet connection until now.

Dr. Spitzer said that the last three tests have all shown that I have Narcolepsy – a blood test, the night time sleep test, and the daytime test that was done the following day. He said that one test alone is not enough for an accurate diagnosis of Narcolepsy. A person has to have at least two of these tests point to Narcolepsy before they can be sure of a correct diagnosis. In my case, all three of these tests indicate Narcolepsy!

I asked Dr. Spitzer if he could make an estimate as to when I'd be able to go back to work. He said it usually takes about 2 months to get the medicine adjusted for the amount that works best for each person.

He's not sure if all of my problems are coming from the Narcolepsy or if I have a combination of several things. I could have Narcolepsy with Basilar Migraines or Narcolepsy with Neurocardiogenic Syncope or all three. After Dr. Spitzer gets the Narcolepsy medicine adjusted so that I'm fully functional, he will gradually withdraw medicines that I have been on (for the other illnesses). If my symptoms

return, he will add that medication back. That's how he'll figure out if I have Narcolepsy alone or with one or two of the other illnesses. He needs to figure that out so that he'll know what medication I need to continue to be on.

I'm guessing that the process of gradually withdrawing, and adding back as necessary, could take up to a month. So, probably be able to come back in 2 3 months. This is certainly not as soon as I wanted, but it could be worse. I'm glad that he's not still looking for an answer. If he was, it would be a lot longer before I could come back. At least, I feel that I'm on the way to getting better.

Cheryl

EXHIBIT 8

Stacy Hoeft

From: Stacy Hoeft [shoeft@hosannatabor.org]
Sent: Monday, January 10, 2005 4:37 PM
To: CHERYL PERICH
Subject: RE: Latest news from Broadspire

Wow! Always something! I'm so glad to hear that they actually sound like their working for you instead of against you. Hopefully this will be the answer to all of your prayers. I received your thank you card today. It was very nice. I heard that Graebel (Beth Pranschke's work) gave you some goodies too. Do you have their address? I'd like to send them a thank-you. I'm sure you already have – it's just that I'm so grateful that they thought of helping someone from HT. Let me know. Otherwise, I'll call Beth.

FYI – we have asked Mrs. Elizabeth Gavrun to substitute for you during your disability. She's an outstanding Concordia graduate who is just dying to get into a classroom. She'll be starting on Tuesday, January 18th. I can't wait. She's so excited and her excitement is contagious. It's refreshing to all of us during the winter doldrums. I'll let you know if she has any questions.

Hang in there. I know it must not be easy. We miss you. Talk to you soon!

Stacy J. Hoeft
Principal
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EXHIBIT 9

Stacy Hoeft

From: CHERYL PERICH
[CHERYL032155@msn.com]
Sent: Wednesday, January 19, 2005 10:17 PM
To: Stacy Hoeft
Subject Re: Dr. Appt.

Stacy,

It does feel great to know that I'm finally heading in the right direction. You're right, he is working hard to make me feel better. He assures me that he will be able to get me fully functional. There is no cure for narcolepsy, but with the medicine that's available now, it can be controlled. I told him that my work day is a little different than public school teachers. I explained what my school day was like, letting him know that I don't have a lunch hour. I told him that I am responsible for Gym, Art, supervising all recesses, and supervising lunch. He said "that's OK". Then, he added, "I said I'll be able to get you fully functional". That's really great news, isn't it?

There isn't any good info. on the internet. I've spent a long time looking at various web sites - ever since I was diagnosed with it. All the web sites about Narcolepsy are old. They have outdated information. Dr. Spitzer gave me a pamphlet that explains narcolepsy. Would you like me to send you a copy of this pamphlet? Even this pamphlet is over a year old, and advancements in treatment have happened since then, but it seems to be the newest information that is available.

Thanks for giving me the info. about the fact that the check for 30% of my income won't be coming any

more. You were wondering if anyone had told me about this. No, no one had told me. In fact, I was thinking my next check would be arriving soon. When it didn't come in today's mail, I thought I'd probably get it tomorrow.

Thanks for all you have done to help me.

Cheryl

—Original Message—

From: Stacy Hoeft
To: CHERYL PERICH
Sent: Wednesday, January 19, 2005 1:27 PM
Subject: RE: Dr. Appt

Cheryl,

I'm so glad to hear that you have such a remarkable doctor. He really sounds like he's working hard to make you feel better. It must feel good to hear that you're finally heading in the right direction.

Also, wanted to give you the heads up that Board of Directors met last night and decided on a new policy for disabilities which will effect both you and Pastor. Someone should be informing you soon that as of the end of February you will no longer be carried by the church's medical insurance at the expense of the church. If you would like to continue receiving medical benefits through HT it will be at both your discretion and your expense (similar to COBRA insurance) for up to six months. You will have to make those arrangements with Sheila Simpson who is our new treasurer. I am assuming (maybe incorrectly) that someone informed you that your time limit for receiving the extra 30% of your salary has expired and therefore you will no longer be receiving any

salary from HT. You will be completely compensated through the disability insurance carrier.

Since it seems that unless I do things around here they don't get done, I thought that I would let you know in case they drop the ball again and don't keep you informed. I'm sorry that things are working out this way. I wish you could continue receiving 100% of your pay. At least now the disability was approved and you're getting payments from Worker Benefits. It seems like they have a plan for you and that's good.

Also, it's that time of year again when I have to start asking teachers about their intentions for next year. I haven't sent out the official forms yet to the teachers but I wanted you to start thinking about what you'll be able to do. Discuss it with your doctor and pray about what would be best for you and for HT. I will probably be asking teachers to make that commitment by the end of next month so that we can start the Call process if we have to. I know that you are in no position to make that decision right now and that if it was up to you you'd be back here teaching today. Unfortunately the administrator in me is trying to think ahead and prepare for what is coming. Just thought I'd get you thinking.

Again, I know that I've said it a million times before, but if there's anything I can do for you, please let me know. I really like all the good news you've been sending my way. Keep it up!

P.S. Are you ever going to be allowed to drive again? I know nothing about narcolepsy. Any good websites you can recommend?

Stacy J. Hoeft
Principal
Hosanna-Tabor Lutheran School

e-mail: shoeft@hosannatabor.org
phone: 313-937-2233
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——Original Message——

From: CHERYL PERICH
[CHERYL032155@msn.com]
Sent: Tuesday, January 18, 2005 7:48 PM
To: Stacy Hoeft
Subject Re: Dr. Appt.

Stacy,

Dr. Spitzer said that we're moving in the right direction. Now, he's making medication adjustments. I'm starting a larger dose of one of my medications. Next week, he's going to add another medicine. Then, I go back to see him on February 8.

Cheryl

EXHIBIT 10

Stacy Hoeft

From: Stacy Hoeft [shoeft@hosannatabor.org]
Sent: Friday, January 21, 2005 3:10 PM
To: CHERYL PERCH
Subject RE:

Thanks for all the info. I have no knowledge whatsoever about your condition. That's why I was wondering what your intentions were for coming back in the fall. I know you *want* to come back, just didn't know if you would be *able* to. Obviously we've found out this year how very different those two words are. I don't want to mislead our new teacher. Jim Pranschke said that we are probably going to be putting something into our handbook that states that any employee who has a disability which extends past six months (therefore long term) will be encouraged to resign their Call so that the church and school will be able to fill the position responsibly. That could even mean reinstating the Call once the employee was healthy again. I'll keep you posted. I know that is what they're asking Pastor to do already. We don't want to have to take the Call away, it's better for everyone if the employee would resign themselves obviously. Anyway, that's all I've got for now. From now on I'll just assume that I'm the only one who gives you any info. I'll tell you and then if someone else tells you too it's better to hear it twice than to never hear at all. We're learning these things the hard way, sorry you always seem to be a guinea pig. Have a great weekend and stay warm.

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EXHIBIT 11

Stacy Hoeft

From: Cheryl Perich [Cheryl032155@msn.com]
Sent: Thursday, January 27, 2005
Subject: More Good News!

Stacy,

I called Dr. Spitzer's office today. He says that I will probably be able to go back to work on Monday, February 14, if everything goes OK with the Medication adjustments between now and them. There is a possibility that I might have to return one or two weeks after that if there is a problem with how I adjust to the next medicine. So, I'll see you sometime between February 14 and February 28.

Thanks for your prayers

Cheryl

EXHIBIT 12

Stacy Hoeft

From: Stacy Hoeft [shoeft@hosannatabororg]
Sent: Thursday, January 27, 2005 7:18 PM
To: CHERYL PERICH
Subject: RE: More Good News!

Cheryl,

Wow! I am surprised to hear that you will be able to return so soon. It was just a few days ago that you said that you were unable to complete your disability forms because of the illness. The medicine must be doing wonders! How often are you "passing out"? I know that it's not really passing out – how do you term it now? Is he going to permit you to come back full time? I (and the board especially) am going to have so many questions for you! I guess I wonder how you're not permitted to drive yet you can be responsible for the safety of a classroom of children. You can see why I'd be concerned.

Also, I want to make it clear that when you are able to return, it will not be to teach third and fourth grades. First, I contracted Liz to teach until June 15th and cannot take her job away. Second, because those children have already had two teachers this year and having a third does not provide a good learning environment for them (not to mention a bad reputation for our school). We need to start thinking about how we can include you back into our staff. Let me know if you have any suggestions. Also, I know that you will not be able to just walk into a classroom and start teaching —no one could. You haven't even stepped foot into our building since last June. There

will have to be some major preparations to be made to provide for a smooth return.

I'm sorry if I don't sound excited for you. I guess the administrator in me is nervous about how to make the best of this situation for everyone. Of course, I'm concerned for you, but please remember that my main concern as the principal is doing what's best for the ministry as a whole especially my students. Please keep me informed, as usual. I will pass this information along to the Board of Ed and the Board of Directors. I'll keep you posted too.

Dan and I are taking the kids to Niagra Falls for the weekend. I'll be back in time for the Voter's meeting on Sunday. I just wanted you to know that so if you e-mail me and I don't respond this weekend you know why. Have a great weekend!

Stacy J. Hoeft
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EXHIBIT 13

HOSANNA-TABOR SHAREHOLDER MEETING
MEETING MINUTES

MEETING DATE: January 30, 2005

Attendees present: refer to sign-in sheet.

1. Opening Devotion by Pastor Eggers.
2. Acceptance of November 2004 meeting minutes – motion by David Milz, second by Annabel Bertram, unanimous acceptance.
3. Acceptance of New Voting Members – Chris and Nicole Tiernan – motion by Bruce Wehrenberg; second by Frank Weide; unanimous decision.
4. Video: "Sow What" (presented by LCMS) – Jim Pranschke
    a. Approx. $4,000.00 of our budget supports the District Office, Missouri Synod and our Ministries.
5. LCMS Constitutional Amendments – Jim Pranschke and Pastor Eggers
    a. Amendment A – places limitations on the authority of the Board of Directors.
        1. Congregation voted "against the proposed amendment".
        2. Almost unanimous; one vote was for amendment.
    b. Amendment B – includes Directors of Family Life Ministries in lists of rostered church workers.
        1. Congregation voted unanimous "for the proposed amendment".

6. 2005 Goals

   a. Call a new pastor and assist him in a successful start to his ministry.

   b. Plan and implement our 50th Anniversary Celebration.

   c. "Spruce Up" the building and grounds for the 50th Anniversary Celebration.

   d. Goals were approved by unanimous vote.

7. Report from the 50th Anniversary Committee – Jim Pranschke

   a. Lutheran School Week begins March 6th. This is the 50th Anniversary Kick-Off date with Pastor Witto as the guest speaker.

   b. July 17th is the anniversary date. The church and school picnic (catered or potluck) will follow the church service with Pastor Kopper as the guest speaker. The picnic will be at Rotary Park or Capitol Park.

   c. On one Sunday this Fall, a coffee hour will be held after the church service and a banquet will occur that evening. Guest speaker and banquet location are to be announced. Dr. Schultz is the first choice as the guest speaker.

8. Nominating Committee – Jim Pranschke

   a. Volunteers should contact Jim Pranschke and prepare the nominations for voting at the May Voters Meeting.

9. Request from Mr. Jim Hoeft to change Call to a Contract – Jim Pranschke

a. Letter submitted by Jim Hoeft, dated January 18, 2005 (attached).

b. Unanimous vote to accept Jim Hoeft's request to be a Contract Teacher.

10. Reports

a. Pastor Eggers announced his doctor won't take him off disability. Pastor is currently being paid 70% of his salary from Disability and H-T is no longer providing him 30%, since the maximum pastor can receive is 70%.

b. Bob Cochran announced the following statistics:

1. Members: 423 in 2003 and 429 in 2004.

2. Members who worship at least 2 times per month: 145 in 2003 and 151 in 2004.

3. Members who worship only once per month: 103 in 2003 and 82 in 2004.

4. Members who worship less than once per month: 175 in 2003 and 196 in 2004.

c. Stacy Hoeft announced we had (8) new students start after Christmas, for a total of (84) students (same as last year at this time). There have been (55) new students attending H-T the last two years, but the same number are leaving and going elsewhere. Stacy asked for incentive ideas to keep students.

d. Stacy Hoeft announced the winter carnival may not happen since there isn't any volunteers to run it.

d. Kurt Ostrander announced the Auction is November 12, 2005.

e. Judy Cochran announced there are still (4) spots available for the Mexico Trip this summer.

f. David Hardoin announced there are (12) to (29) kids attending Sunday School each week and the average per week is (21).

g. David Hardoin announced that Debbie Pranschke is running VBS the week of July 18th.

11. Report on the Revised Disability Policy (refer to attachment)

a. Jim Pranschke reviewed the policy with the attendees.

12. Proposals concerning our disabled employees (refer to attachment)

a. A third proposal was recommended by Sheila Simpson to only cover Pastor Eggers with medical benefits. Support by Judy Cochran. 17 votes for and 15 against, but proposal was denied since it wasn't a majority vote.

b. Pastor Eggers: Option 2 was approved by a majority vote; 43 to 5.

c. Cheryl Perich: Option 2 was approved by a majority vote; 35 to 8. A timeline will be established by the School Board at their next meeting in February.

13. Other Business

a. General announcements.

14. **Adjournment/Closing Devotion** – adjourned with **The Lord's Prayer**.

Prepared by Kurt Ostrander, Secretary.

Hosanna-Tabor Disability Policy

- If an insurance carrier determines an employee to be disabled, Hosanna-Tabor will pay full compensation during the two week waiting period.
- Hosanna-Tabor may also continue to pay the difference (30%) of the employee's salary for the next two-and-a-half months (for a total of 90 days) at which time the Board of Directors will review the possibility of an extension for a maximum of six months. The employee may be required to provide written rationale in the form of a petition to the Board of Directors for such an extension.
- Group benefits will be paid by Hosanna-Tabor for as long as the 30% salary is continued, but no longer than six months. After such time medical benefits may be continued at the cost of the employee to be arranged between the employee and the Board of Directors. Our current medical insurance carrier allows a six month extension once the disabled employee is paying the premium to facilitate the search for alternative coverage.
- If the disability is never approved all accumulated sick days will be exhausted and recovery of salaries paid may be sought.
- Employees who are disabled for more than six months may be asked to resign a contract or seek a peaceful release from a Call so that an appropriate replacement may be acquired.
- Decisions made under this policy will be made at the discretion of the Board of Directors,

unless it is determined to have negative implications on the budget, at which time it would require Congregation approval.

- This policy may require amendments to be made at any time, which will be effective as the Board of Directors deem necessary for the benefit of the ministry as a whole.

SHAREHOLDER JANUARY 20, 2005

1. Jim Pranschke
2. Brad Neaubauer
3. Eleanor [Illegible]
4. Burnetta MacFarlane
5. Elda Krenkow
6. [Illegible]
7. Ralph Butte
8. Ona Blithe
9. Jerry Dawkins
10. [Illegible]
11. John [Illegible]
12. Bob McGhee
13. [Illegible]
14. Mary Krause
15. Sally Luback
16. Lucille Forth
17. Catherine [Illegible]
18. [Illegible]
19. Sharon Fischer
20. [Illegible]
21. Issabel Bertram
22. Sue [Illegible]
23. Robert Oppenlander
24. Arlene Oppenlander
25. Jim Houpt
26. Ellen Milz
27. [Illegible]
28. Kara Meyer
29. [Illegible]
30. [Illegible]
31. Margie Mick
32. Kurt Ostrander
33. [Illegible]
34. Scott Salo
35. Kim [Illegible]
36. [Illegible]
37. Rosemary [Illegible]
38. Mary J Nurmi
39. [Illegible]
40. Doris [Illegible]
41. Lou [Illegible]
42. Judith K. [Illegible]
43. Sue Eggers
44. Susan Templin [Illegible]
45. Bruce Wehrenberg
46. Frank Weide
47. Nicole Tiernan
48. David [Illegible]
49. Janeene [Illegible]
50. Randall Eggers
51. Wesley [Illegible]
52. Sheila Simpson
53. Stacy Hocks
54. Dan Hocks
55. [Illegible]
56. Ray West
57. Bob Cochran
58. Bob Luedtke
59. Edith Luedtke
60. Lisa Reardon
61. Chris Tiernan
62. [Illegible]
63. Charlotte Salo

Options concerning medical benefits
for Pastor Eggers

1.) The Board of Directors in their January 2005 meeting after lengthy discussion, agreed that it is important that we treat our two disabled employees similarly and due our fiscal responsibility to the congregation we propose that the congregation follow the new disability guidelines (previously discussed in this meeting), This implies that Pastor will be responsible to make premium payments for March 2005 and later.

Reasons:

- Desire to treat all disabilities (current and future) similarly
- Concern for the financial burden to the congregation to cover medical premiums for both Pastor Eggers and Cheryl Perrich.
- Medical premium of approximately $ 13,000 have already been paid out while Pastor has been disabled.
- Current employee handbook states benefits will be continued for three months and we have already exceeded this period.

2.) Alternative proposal presented by Jim Pranschke, President and Bob Cochran, Chair of the Board of Elders.

Reasons:

- Pastor has made a request to the congregation to have us continue paying his medical premium.

- Pastor has requested the congregation ask Church Extension Fund to refinance his mortgage for the longest term available in order the reduce the monthly payment (by approximately $130)
- Many people in the congregation have expressed concern regarding the discontinuation of the church's support in this area.
- The Board of Elders shares a similar concern.
- It is important that Pastor refinance his home mortgage with an outside financial organization. Currently, his mortgage is with the Church Extension Fund under Hosanna – Tabor.

Proposal:

- Congregation will request CEF refinance Pastor's mortgage as he has requested, with the understanding that this is a short term arrangement.
- Pastor and Sandie Eggers have committed to refinancing their home with an outside financial organization.
- Congregation will continue to pay his medical premiums through December 2005 for the same benefit program he is currently enrolled in (or similarly priced program if a change becomes necessary) (Note: Pastor currently pays to cover his son, Karl and this would remain unchanged.)

- If Pastor would become eligible for medical benefits paid by an employer or another party, Hosanna – Tabor would discontinue their premium payments immediately.

Options concerning medical benefits
for Ms. Cheryl Perich

1.) The Board of Directors in their January 2005 meeting after lengthy discussion, agreed that it is important that we treat our two disabled employees similarly and due our fiscal responsibility to the congregation we propose that the congregation follow the new disability guidelines (previously discussed in this meeting). This implies that Ms. Perich will be responsible to make premium payments for March 2005 and later.

Reasons:

- Desire to treat all disabilities (current and future) similarly
- Concern for the financial burden to the congregation to cover medical premiums for both Pastor Eggers and Cheryl Perich.
- Medical premium of approximately $ 8,800 have already been paid out while Ms. Perich has been disabled.
- Current employee handbook states benefits will be continued for three months and we have already exceeded this period.

2.) Alternative proposal presented by Jim Pranschke, President, Scott Salo, Chair of the School Board, and Bob Cochran Chair of the Board of Elders.

Reasons:

- Ms. Perich hasn't requested the congregation that we continue paying her medical premium, but she is unaware that this is being contemplated.
- We anticipate she will ask when she learns of Pastor's situation.
- It is desirable to treat both our disabled employees similarly.
- Some people in the congregation have expressed concern about treating them differently.
- Our school administrator and the School Board feels it is very unlikely Ms. Perich will be physically capable to return to the classroom this year or next year.
- It is important to the school's operation that Ms. Perich ask for peaceful release from her call to facilitate the search for a replacement.

Proposal:

- Authorize the Congregation to present Ms. Perich with the offer to continue a portion of her medical premium payments through December 2005 once she has asked for peaceful release from her call. (Note: Ms. Perich currently pays to cover her adult child and this would remain unchanged.)
- Currently, Ms. Perich is covered under a BCBS PPO Plan. All other employees are covered under a less expensive BCBS

HMO Plan. Ms. Perich was covered under the PPO Plan when the Congregation changed coverage for all new employees to the HMO program.

- The portion we propose to offer is the premium associated with Family Coverage under the HMO program. A dollar amount is not specified since premiums for both programs are anticipated to increase during 2005.
- If Ms. Perich would become eligible for medical benefits paid by an employer or another party, Hosanna – Tabor would discontinue their premium payments immediately.

EXHIBIT 14

Stacy Hoeft

From: Stacy Hoeft [shoeft@hosannatabor.org]
Sent: Monday, January 31, 2005 1:44 PM
To: Cheryl Perich
Subject: follow-up

Cheryl.

I just wanted to reply to your last e-mail so that you wouldn't think that I'm ignoring you. I know that by now you have heard about the meeting yesterday. I did receive your last e-mail (the explanations to many of my questions). I have spoken on your behalf at every opportunity. I am sorry if you feel that I have betrayed you. I'm not feeling very appreciated myself.

As a result of yesterday's meeting this entire situation has been taken out of my hands. This a congregation/board issue and you will be contacted (if you haven't already) by Jim Pranschke regarding this and any future decisions that may be made. If you should have any further questions or concerns regarding your disability and/or future employment at Hosanna-Tabor please contact Jim Pranschke. (jim.pranschke@gabriekoeder.com or 734-591-6367) Also, I have been in contact with Mr. Bruce Braun regarding all of these matters. He is fully aware of the situation and has provided a lot of guidance to me and has volunteered his guidance to you as well. You can contact him through the district office. If you need that phone number, please let me know.

We will continue to pray for you. Keep in touch!

Stacy J. Hoeft
Principal
Hosanna-Tabor Lutheran School

e-mail: shoeft@hosannatabor.org
phone: 313-937-2233
fax: 313-937-2173

EXHIBIT 15

A. Robert Spitzer, MD
20180 West 12 Mile Road, Suite 10
Southfield, Michigan 48076
Phone: (248) 358-5959

Date 2/8/05

This is to certify that Cheryll Perich

has been under my care for the following:

Narcolepsy

and is able to return to work / school on 2/22/05

Remarks:

(SIGNATURE)

#13107 — Medical Arts Press 1-800-328-3170

EXHIBIT 16

[00001] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE 2:07-cv-14125
Hon. P. J. Duggan

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

-vs-

HOSANNA-TABOR EVANGELICAL
LUTHERAN CHURCH AND SCHOOL,
Defendant.

and

CHERYL PERICH,
Plaintiff/Intervenor,

-vs-

HOSANNA-TABOR EVANGELICAL
LUTHERAN CHURCH AND SCHOOL,
Defendant.

DEPONENT:	SHEILA SIMPSON
DATE:	Wednesday, June 25, 2008
TIME:	1:10 p.m.
LOCATION:	31780 Telegraph Road, Suite 200 Bingham Farms, Michigan
REPORTER:	Angela R. Mitchell, CSR-2151

[00023] all I asked before we went into the meeting was how was she doing, because she was in communication with her.

Q. Okay. All I'm—I'm just trying to figure out which took place first, the board meeting in which Cheryl addressed the board, or your informal discussion with Stacey? I'm just trying to clarify if you talked with Stacey and first found out about the narcolepsy before the board meeting?

A. Yes. Before the board meeting, I asked—I had asked her. That was after the previous one.

Q. Okay. Right. Okay. I'm going to represent to you that at this point, Ms. Hoeft has already testified that the board meeting in which Cheryl addressed the board took place on February 13th, 2005, just so you understand my line of questioning going forward. Okay?

A. (Nodding head.)

Q. To the best of your recollection, what was the purpose of that meeting?

A. To the best of my recollection, was to hear Ms. Perich's side of the story of her illness and her plans.

Q. Okay. And did she—did Cheryl, at that [00024] point in time, indicate that she wanted to return to work and teach?

A. Yes.

Q. And did she present a doctor's note releasing her or clearing her to return to work by a certain date?

A. I believe so.

Q. And what was the board's response to the doctor's note and Cheryl's desire to return?

A. I want to say I remember in that meeting asking Cheryl about the medication she was on, just to get a clear idea of that, and how it would affect her teaching. I do remember talking about that in that meeting.

Q. Okay. Did the board take a position about whether or not to allow Cheryl to return that school year?

A. Truthfully, I do not remember if they said about letting her come back that year or not.

Q. Was there any discussion about whether or not she could come back the following year?

A. No, there wasn't, that I remember.

Q. When Cheryl presented her doctor's note to return to work, was the board not convinced that she was ready to return or uncomfortable with the

* * *

[00026] A. Just the ones that were at the board meeting. And it was the concern about her, you know, not being able to take care of the classroom in a normal setting way. Is she going to be all right? Will she—is the medication going to affect her? Will it affect the children in the classroom? Will she pass out or, you know, whatever.

I think it was just—for me, it was unclear. It would have been nice to have more than a doctor's note, maybe a doctor saying this was what is going on and explain it better to us for understanding. Being laypeople, you just don't know.

Q. Okay. So at that point, the concerns of the board weren't really based on any medical information they had received at that point because they hadn't received any?

A. Correct.

Q. Okay. During that meeting, did you express—did you personally express a concern that it would frighten the children and they wouldn't know how to handle seeing Cheryl pass out, if that were to happen?

A. Yes.

[00027] Q. Okay. And you said that to Cheryl or that was just something that you voiced?

A. I just voiced. Well, she was there. And I had asked the question about her narcolepsy and just a little more detail on it and the drugs she was taking and what would happen.

You know, is—just is she going to be okay in order to get in the classroom? What will happen if you do fall out, medication wise? You know, what reactions is there going to be? You know, will the children be safe? Are you going to be safe? That was my main concern.

Q. Okay. With that being said, were you at that point comfortable with her returning to work that school year at the time of the meeting?

A. At the time of the meeting?

Q. Yes.

A. I'd like to have had more information on her condition. I would like to have had—and I know it's between her and her doctor. I understand that. But being that the children would have been involved, I would have—I personally would have liked to have had more information.

Q. Okay.

A. More information about narcolepsy itself, [00028] more information about the medication she was on to get a better understanding on whether or not she was able to come back and do her job as a teacher.

Q. And without that information, you weren't comfortable one way or the other as far as whether or not she should come back that school year?

A. I had asked if we can get more information on it. And I had researched some stuff on my own, but I

didn't share it with anyone, just to get a better understanding of it. And I just, at the time, I wasn't too sure. But if her doctor cleared her, you know, then I guess he would know best.

Q. Okay. And you said—when you say you did some research on your own, are you talking about once that meeting ended or before the meeting?

A. No, when the meeting ended.

Q. Okay. So at the time of this meeting on February 13th, you would agree with me that the board indicated to Cheryl that she could not return at that point?

A. Correct.

Q. And before the meeting ended, did the board reiterate its request from Cheryl for a peaceful release from her call?

[00029] A. Yes.

Q. During this same meeting on February 13th, did you express an opinion that you would have been more comfortable with Cheryl returning if she were symptom-free for six months to a year?

A. Yes.

Q. Why did you say that?

A. Because I wanted to make sure that she was well enough to come back in a normal—not that she's abnormal, but as a normal teacher, her ability to do what she is supposed to do off any medications that were, you know, strong. Just that she was back to her normal healthy self.

My concern was the children more than anything. As far as if anything happened to her, they would be so scared and you don't want to scare children.

Q. Okay. So—I understand that. I understand your answer. But I want to know, why did you pick the six

months or more as a time period? Was that just something that you—

A. It was—at the time, it was probably the drugs that she was on to get out of her system. You know, did she need some other treatment of some kind? Is something else going to accompany this?

[00030] You know, is this it, narcolepsy? Is that the only thing that was wrong? Because I didn't know if there was anything else wrong.

Q. And prior to this meeting, given your testimony that you did some research afterwards, I'm assuming you didn't—you were not well versed in the area of—in the medical field related to narcolepsy, correct?

A. Correct.

Q. And you still aren't because you're not a medical professional. Is that fair?

A. I'm—I just graduated from Schoolcraft in the certified medical assistant. So now I know more than I did then. I can honestly say that.

Q. Okay. Were you a student at Schoolcraft at that time, at the time of—

A. No, I was not.

Q. Okay. But nevertheless, I mean, there's no specialization background that you possessed in that—in the area?

A. Just that I've had medical classes and stuff like that. My sister is an R.N. We have doctors in the family, outside of that.

Q. Okay. Did the board take the position during the February 13th meeting that Cheryl could

* * *

[00043] Q. Going back to the February 13th, 2005 meeting of the school board where Ms. Perich had spoken to the board and then left while the board

continued, did you tell people during that meeting that you had a medical background?

A. I had some medical background, yes, because I started off in nursing and didn't like the hospital scene, so I didn't continue with the nursing.

Q. You were in school?

A. Yes.

Q. I think you stated earlier that the board and yourself had not received any additional medical information from Ms. Perich's doctor, is that correct?

A. I didn't, no.

Q. All right. But didn't you see and didn't the board see that, in fact, there was an opinion from her doctor that stated, in his medical opinion, that she—he was—that she was able to return to work and did not list any additional restrictions?

A. The only thing I saw was a note stating that she could come back to work. That's all I remember seeing.

Q. Okay. Isn't that a doctor's opinion that [00044] she can return to work?

A. Yes.

Q. Did the folks at the meeting, the members of the school board decide to disregard the doctor's opinion?

A. Yes.

Q. Prior to the January 30th, 2005 meeting, did Ms. Hoeft or anyone else tell you that Ms. Perich had informed the school board or through Ms. Hoeft that she would be able to return to work in the middle of February?

A. I believe so.

Q. I understand that you're currently a CMA, which is a certified medical assistant?

A. Yes.

Q. All right. And prior—or prior to and also at the same time, you're working part-time selling high-end jewelry?

A. Yes.

Q. All right. At some point in time, did you own your own company?

A. Yes, I did.

Q. All right. What company did you have?

A. I had a wholesale company, I had a used bookstore and I had a DNA testing company.

EXHIBIT 17

Stacy Hoeft

From: CHERYL PERICH [CHERYL032155@msn.com]
Sent: Monday, February 21, 2005 9:03 PM
To: Stacy Hoeft
Subject: Decision on peaceful release offer

Stacy,

I have decided to not ask for a peaceful release. Since you already have a copy of the return to work slip that Dr. Spitzer wrote for me, I will return to work tomorrow, February 22, 2005. See you in the morning.

Cheryl

EXHIBIT 18

Hosanna-Tabor
Lutheran Church

EMPLOYEE
HANDBOOK

Hosanna-Tabor Lutheran Church and School
9600 Leverne
Redford, MI 48239
(313) 937-2224 (church)
(313) 937-2233 (school) Adopted (May), 2004

* * *

salary as paid by the insurance carrier. The employee will continue receiving their regular salary during the disability and will be required to sign over any compensation received from the insurance carrier.

It is your responsibility to contact your supervisor as soon as possible when you are unable to report for work. It is expected that teachers will secure an appropriate substitute from an approved list provided by the school office. A physician's certification is required for any illness beyond 3 consecutive working days.

The school principal shall be responsible for maintaining accurate and proper records of the absences of the school secretary, custodian and teachers. Such absences shall then be reported to the payroll officer.

Absences of the church secretary are the responsibility of the Administrative Pastor.

3.500: BEREAVEMENT DAYS

Time off with pay for regular full-time 10 month and regular full-time 12 month employees may be approved in the event of a death in your family. (See

Section 3.400 regarding sick days.) If sick days have been exhausted, the employee may seek a personal leave.

3.600: OTHER LEAVES

3.605: Introduction

The church makes leaves of absence without pay available to employees who have completed at least one year of continuous service, for any length of time up to a calendar year that is recommended by the appropriate board and approved by the Board of Directors. Written requests must state the reason for the leave, as well as the beginning and ending dates. Requests for leaves will be granted at the sole discretion of the church, based on the facts and circumstances surrounding each individual request. Employees who return to work at the end of a leave of absence will normally be returned to their former job classification if an opening exists. If there is no such opening, they will be considered for a comparable position if one is available. Leaves of absence are also granted where state and/or federal law mandates. In particular, the church complies with leaves for jury duty and in situations where the State Family Care and Medical Leave Act or the Federal Family and Medical Leave Act applies. In any situation regarding leaves of absence, the employee should notify the appropriate supervisor at the earliest possible date to discuss the leave.

3.610: Personal Leave

Personal Leave - a leave of absence for a compelling personal reason that is not medically related. A calendar year of leave time is granted without salary or pay status change.

3.620: Jury Duty

Jury Duty - a leave of absence to serve on jury duty.

Employees will be granted a leave of absence, with pay, to serve on jury duty, as required by law. When serving on jury duty, employees will be paid at the usual rate. The jury fee is to be submitted to the employer. Mileage payment is not to be relinquished.

Upon completion of jury duty, a Verification of Attendance Form must be presented to the church. Employees who are excused from jury duty for the day, or are excused early, should report to work when it is practical to do so.

3.630: Military Leave

Military Leave - a leave of absence for required active or reserve military service.

The church complies with applicable state and federal law concerning leaves for military service. This leave will be granted without pay for the duration of service.

3.635: Workers Compensation Leave

Workers Compensation Leave - a leave of absence because of work-related illness or injury.

The church complies with applicable state and federal law concerning leaves for work-related illness or injury. It is important that you report any work-related injury to your supervisor as soon as it happens. Employees on leave because of work-related illness or injury will be reviewed on an individual basis by the chairperson of the appropriate board.

3.640: General Provisions

The following general provisions apply to all leaves of absence:

1. A request for an extension of a leave of absence, where possible, must be made in writing prior to the expiration date of the original leave, and when appropriate, must be accompanied by a physician's written statement that certifies the need for the extension.
2. Failure to return to work on the first workday following the expiration of an approved leave of absence may be considered a voluntary termination.
3. Coverage under the church's group employee benefit plans will be continued on the following basis:

Employees will be required to pay the entire premium for continued coverage during the portion of an approved leave of absence in excess of thirty (30) days.

4. Employees will not accrue length of continuous service for the portion of a leave of absence in excess of four (4) calendar months, unless otherwise provided by law.
5. Employees on leave of absence will be subject to lay off on the same basis as employees who are actively at work.
6. Employees on leave of absence must communicate with the church on a regular basis, at least once each month, regarding their status and anticipated return to work date.
7. Employees on leave of absence who seek or accept other employment without the church's prior written approval may be subject to disciplinary action, up to and including possible termination.

8. Employees who falsify the reason for their leave of absence may be subject to disciplinary action, up to and including possible termination.

9. All leaves of absence must be approved in advance, in writing, by the Board of Directors.

3.650: Family and Medical Leave

Hosanna-Tabor Lutheran Church is not subject to the provisions of the FLMA of 1993.

3.700: GROUP EMPLOYEE BENEFIT PLANS

Because of its Christian concern for its employees, Hosanna-Tabor Lutheran Church provides benefit programs in order to help its employees with expenses related to illness, injury, or death, as well as to provide retirement income.

Eligibility: All regular 10 month and 12 month full-time employees are eligible for enrollment in the currently subscribed to medical, disability and retirement plans on the first day of the month after the date of employment

EXHIBIT 21

VERCRUYSSE MURRAY & CALZONE

A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS

SUITE 200, 31780 TELEGRAPH ROAD
BINGHAM FARMS, MI 48025-3469

Robert M. Vercruysse
Gregory V. Murray
David B. Calzone
Diane M. Soubly
Bernice McReynolds
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Dorothy Hanigan Basmaji
Susan Hartmus Hiser
Debra Auerbach Clephane
James E. Roach
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Gary S. Fealk
Louis B. Eble
Priscilla Krebs
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Amy E. Metz

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Website
www.vmclaw.com

Retired:
Virginia F. Metz

March 21, 2005

Mr. Deano Ware
26677 W 12 Mile Rd
Southfield, MI 48034

Re: Cheryl Perich and Hosanna-Tabor Evangelical Lutheran Church

Our firm represents Cheryl Perich regarding her employment with the Hosanna-Tabor Evangelical

Lutheran Church ("Hosanna-Tabor"). We have been informed that Hosanna-Tabor has refused to allow Ms. Perich to return to work and is in the process of terminating her employment.

We understand that Ms. Perich became ill in approximately June of 2004 and that she informed Hosanna-Tabor of her illness in approximately August, prior to the beginning of that school year. She was later informed that a substitute teacher would be hired on a temporary basis and that she could return to her position upon the alleviation of her illness. Although somewhat belatedly, she also received benefits under Hosanna-Tabor's short-term and long-term disability insurance policy. Ms. Perich was eventually diagnosed with narcolepsy, which was the sole cause of her disability.

Dr. Spitzer was the physician who eventually correctly diagnosed Ms. Perich's condition. He put her on a course of medication to resolve the narcolepsy. When Ms. Perich informed Hosanna-Tabor of the progress being made, she was told that the Board had doubts about whether she would be able to teach because of her disability and that there were "many questions" concerning her illness.

On or about January 27, 2005, Dr. Spitzer determined that Ms. Perich's narcolepsy was fully controllable by the course of medication and he scheduled her to released to return to work by no later than February 28, 2005. After informing Hosanna-Tabor of her expected return to work date, Ms. Perich was called by Scott Salo, the President of the Board for Hosanna-Tabor. Mr. Salo requested that Ms. Perich meet with him and another Board member to discuss her job. Because she had been informed that Hosanna-Tabor was considering terminating her

employment, Ms. Perich requested that she be allowed to address the entire Board, and Mr. Salo agreed.

The Board met with Ms. Perich in attendance on or about February 13, 2005. During this meeting, Ms. Perich was provided with a written proposal where she would resign from her employment and Hosanna-Tabor would continue her on its insurance policy, largely at Ms. Perich's expense. When Ms. Perich again informed the Board that she had been released to return to work without restrictions and provided it with a copy of her return to work authorization, she was met with skepticism and disbelief. She was told by one Board member, who professed to have a medical background, that Ms. Perich would have to be symptom free for a period of three months prior to returning to work. This same Board member then stated that if Ms. Perich "passed out" in front of the children that it would scare them and they would worry that they may catch the illness. Ms. Perich was later told that the parents would want her to be free of symptoms for six months to one year prior to returning, and she was questioned about her ability to drive. Ms. Perich was also told by a Board member that her doctor could not be trusted since doctors write release forms when a patient has to return to work rather than when a patient is able to return to work. Shortly after these statements were made, Ms. Perich was asked to leave the meeting.

On or about February 14, 2005, Ms. Perich was informed that Hosanna-Tabor had decided to "keep everything the same," meaning that it would not reinstate her to her position and was seeking her resignation.

Ms. Perich was required to return from her medical leave under Hosanna-Tabor's policies by February 22,

2005, and she reported to work on this date. When she did so, however, she was accused of being disruptive, which was false, and she was asked to leave the premises. She was also provided with a letter signed by Mr. Salo stating that she had provided "improper notification" of her return to work and requesting that she continue her leave to "allow the congregation a chance to develop a plan" for her possible return.

Later that same day, Ms. Perich received an email from the Board accusing her of not really wanting to return to work and stating that she had already been informed that there was no position for her at the school. The email then stated that the Board was reviewing the process for terminating her employment and instructed her not to return to the School.

The facts of this case demonstrate blatant and unlawful discrimination against Ms. Perich because of her actual history of and perceived disability. Pursuant to Michigan's Persons with Disabilities Act, MCL 37.1101 *et seq.*, it is unlawful for an employer to take an adverse employment action, such as terminating an employee's employment, based on a disability that does not prevent the employee from performing the essential functions of the job. MCL 37.1202. In addition, it unlawful under the Persons with Disabilities Act for an employer to take an adverse employment action against an employee based on a record of a disability or a perceived disability that the employer perceives will prevent the employee from performing an essential function of the job. MCL 37.1103(d)(ii) and (iii).

Similarly, the Americans with Disabilities Act of 1990, 42 USC §12101 *et seq.*, prohibits discriminating against an employee by taking an adverse employment action based on an actual or perceived disability

that does not prevent an employee from performing the essential functions of a job. 42 USC §12112. As held by the United States Supreme Court in *Sutton v United Air Lines, Inc*, 527 US 471 (1999):

> There are two apparent ways in which individuals may fall within [the "regarded as" category of the definition): (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual—it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantial limiting impairment when, in fact, the impairment is not limiting.

Under both state and federal law, an employee who has been unlawfully discriminated against on the basis of a disability (actual or perceived) is entitled to back pay, front pay or reinstatement, compensatory damages, and attorney fees.

In this case, Ms. Perich's treating physician authorized her to return to work without restrictions. The Board of Hosanna-Tabor, however, chose not to believe the physician and, in effect, accused him of lying to benefit Ms. Perich. The Board of Hosanna-Tabor also used its own "medical" understandings to determine that Ms. Perich was not medically able to perform a job as a teacher, in total disregard of the clearance provided by Ms. Perich's physician. This type of conduct and bias is the exact same conduct

that the disability discrimination laws prohibit and are intended to prevent.

Notwithstanding the fact that liability is clear in this case, for a limited period of time, Ms. Perich is willing to consider an amicable resolution of this matter. If this is going to be accomplished, an agreement will need to be reached regarding benefits and compensation to be paid to Ms. Perich for the remainder of this school year and her position for next year. If Hosanna-Tabor is interested in resolving this matter without litigation, please contact my office promptly. If we do not receive a timely reply, Ms. Perich will have no choice but to either initiate legal action directly or to file a charge of discrimination with the Equal Employment Opportunity Commission.

Please advise.

Very truly yours,

VERCRUYSSE MURRAY & CALZONE, P.C.

/s/ James E. Roach
James E. Roach

EXHIBIT 22

HOSANNA-TABOR SPECIAL VOTER MEETING MEETING MINUTES

MEETING DATE: April 10, 2005
Attendees present: refer to sign-in sheet.

1. Opening Devotion by Pastor Eggers.
2. 50th Anniversary Budget—Jim Pranschke
   a. Jim presented a list of items and estimated costs to be approved by the voters (refer to the attached list).
   b. The proposal to the voters includes an attempt to try and complete this list of items before this Fall, and not to exceed $25,000.00.
   c. Other misc. expenses for the 50th Anniversary Celebration will also include room and board costs for our Speakers throughout 2005.
   d. $15,000.00 is available through the church extension fund.
   e. The other $10,000.00 may be raised through our 50-50 fundraiser—each family can donate $50.00 towards this new budget item.
   f. Vote—motion by Bob McGhee, support by Gerald Salo, unanimous approval.
3. Cheryl Perich's Call as a teacher at Hosanna-Tabor Lutheran School—Scott Salo
   a. Jim Pranschke summarized the events that led up to this meeting, including several meetings he and Bob Cochran had attended.
   b. Cheryl Perich thanked Hosanna-Tabor for their thoughts, prayers and support throughout her disability. Her only statement was to inform the Voters that it's against the law to

ask someone to quit work when the doctor has cleared her to go back to work.

c. Scott Salo verbally presented a summary of events regarding Cheryl Perich's disability and the reason why we were gathered to discuss her Call (refer to the attached list of issues, which wasn't a handout).

d. Scott Salo made it clear the reason why the School Board is asking the Voters to rescind Cheryl Perich's Call is not because of her disability, but because of her actions since February 22, 2005.

e. A vote by secret ballot was performed. The results were 40 to 11 to rescind Cheryl Perich's Call. Jim Pranschke stated a 2/3 majority is needed to rescind a Call (Note: the Constitution requires a three-fourths majority; the vote was 78.4% to rescind).

f. Jim Pranscke stated the Voters may want to consider a severance package for Cheryl's service at Hosanna-Tabor. After much discussion, it was decided to not vote on any proposal to offer Cheryl. Cheryl's attorney was basically asking for employment, but since that is no longer an option, the Voters didn't want to proceed with any type of severance for Cheryl.

g. It's possible Cheryl and her attorney may file a complaint with the E.E.O.C. If this occurs, then an investigation will follow and the E.E.O.C. will either dismiss the grievance or a law suit will be filed against Hosanna-Tabor. If the law suit is pursued, then future Voters meetings will take place to discuss any required actions by Hosanna-Tabor. The timeline for this issue may last 3 to 6 months.

4. Adjournment/Closing Devotion—adjourned with The Lord's Prayer. Prepared by Kurt Ostrander, Secretary.

Points to stress at 4/11/05 Voter's Meeting

- Mrs. Perich was unable to work from June 15, 2004 - February 22, 2005.
- Mrs. Perich had to be replaced for this school year in order to provide a proper learning environment for the children in grades two, three, and four.
- Mrs. Perich was paid her full salary and group benefits (including medical) from June 15-December 31, 2004, even though this exceeded the 90 days coverage stated in the handbook.
- Hosanna-Tabor Lutheran Church and School collected a special offering at Christmas for Mrs. Perich that totaled around $1200 and various gifts.
- On January 30, 2005 Congregation of Hosanna-Tabor Lutheran Church votes to ask Mrs. Perich to request a peaceful release from her Call (in order to release ourselves from the difficulty in replacing her) in return for medical coverage (at the HMO rate) until December 31, 2005. (A similar offer was approved to be offered to Pastor Eggers)
- Mrs. Perich declined the church's offer stating that she wished to return this year. However, due to our policy stated in our Employee Handbook "Employees who return to work at the end of a leave of absence will

normally be returned to their former job *classification if an opening exists*, if there is no such opening, they will be considered for a comparable position *if one is available*."

- On February 13, 2005 Mrs. Perich met with the Hosanna-Tabor School Board. The policy stated in the previous bullet was shared with Mrs. Perich and she was told that she would not be permitted to return to work for the remainder of the 2004-05 school year. The Board also told her at this time that her employment regarding the 2005-06 school year would depend on the enrollment and staffing needs, which had not been decided as of that date. She was told that due to the previously stated policy a position would not be created for her if there were not a position open for her in the fall, therefore no promises were made.

- Knowing that there was not a position available for her to return to, Mrs. Perich still returned to work on February 22, 2005, without proper notification of her return (an e-mail to the principal's work e-mail address at 9:03 p.m. on February 21, 2005) and would not leave the building until she was given written notice that she should leave. Mrs. Hoeft, after consulting with the District office, gave Mrs. Perich the notice she requested and Mrs. Perich left.

- School Board met and decided that due to the difficulties we have encountered throughout Mrs. Perich's employment with Hosanna-Tabor Lutheran School and especially with her act of insubordination on the

morning of February 22, 2005 we would encourage Mrs. Perich to request a peaceful release of her Call or the Board would be requesting that the Congregation rescind her Call at the April 10 Special Congregational Meeting.

NOTES

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Sign in Special Votes Meeting April 10, 08

1. Jim Franschke
2. Cathy Nurmi
3. [illegible]
4. Gerald Kurtzen
5. Janeene Rotte
6. Mary Nurmi
7. Ralph Butzke
8. Omer J Butzke
9. Hilde Franschke
10. Eleanor Immen
11. Kara Meyer
12. Margaret Schumer
13. Marlene [illegible]
14. Albina Mohar
15. Mildred Crane
16. [illegible]
17. [illegible]
18. Lucille Forsta
19. Ellen Mills
20. Judith R Johnston
21. [illegible]
22. Debbie Franschke
23. Lorraine Kolle
24. Willie [illegible]
25. Bob Cochran
26. Ron Karasuk
27. Deano Ware
28. RICHARD L. DAWKINS, SR
29. Perry Dawkins
30. [illegible]
31. Tim [illegible]
32. [illegible]
33. Frank [illegible]
34. [illegible]
35. [illegible]
36. [illegible]
37. [illegible]
38. Robert [illegible]
39. Richard [illegible]
40. [illegible]
41. [illegible]
42. Julia M. Krohn
43. [illegible]
44. Scott [illegible]
45. [illegible]
46. Elizabeth Schimantowski
47. [illegible]
48. [illegible]
49. [illegible]
50. Ella Kremer
51. Catherine Rosevear
52. [illegible]
53. KURT ESTRANDER

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Taxes and Ministers
2007 edition (rev. 10/07)

Topics:

- The IRS's definition of minister
- Employment status: W-2 or 1099
- Housing/Parsonage allowance
- Reporting income and expenses
- Paying federal and state taxes
- Social Security taxes
- Tax-favored savings plans

[Logo] A brochure designed for ordained Or commissioned Ministers of The Lutheran Church–Missouri Synod

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* * *

Does IRS consider me a "minister"?

As a qualified graduate (whether male or female) of a synodical educational institution, you will likely fill an assignment that has been duly extended by an authorized calling body. A qualified graduate includes a pastor, teacher, Director of Christian Education, Director of Christian Outreach, Certified Lay Minister, deaconess, parish assistant, Director of Parish Music, and Director of Family Life Ministry who are listed on Synod's roster as a graduate or colloquized. If ratified by congregations of the Synod, Directors of Family Life Education will also be added to Synod's roster as qualified graduates. From that point on, your service in the ministry of The Lutheran Church-Missouri Synod (LCMS) as either an "ordained minister" or "commissioned minister" will be subject to special tax rules and entitled to certain privileges afforded IRS-recognized "ministers of the Gospel",

The Tax Importance of your service "in ministry"-

To be entitled to the special tax treatments afforded to a "minister of the Gospel", you must earn your compensation "in the exercise of the ministry". The exercise of the ministry includes

pastoring, teaching or holding administrative positions in any one of the synodical churches, parochial schools, colleges, or universities, and other religious organizations under the authority of a church. Then (under certain circumstances) ministers are permitted to exclude from taxable income the value of a parsonage or a housing allowance. To qualify for the exclusion, the parsonage or housing allowance must be pre-approved by your congregation's appropriate governing body and provided as part of your compensation for services as a minister of the Gospel.

Simply being ordained or commissioned and being on Synod's roster is not enough. If you are not conducting activities "in the exercise of the ministry", you cannot take advantage of the parsonage or housing allowance exclusion. Both you and your authorized calling body may be penalized if this requirement is ignored. The only exception to this rule applies to retirees. Upon retirement, you may exclude 100% of your pension payments that represent compensation for past services performed as a minister (providing the amounts have been officially pre-designated as housing allowance and to the extent such payments are used to provide a home).

EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 2:07-CV-14124

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

v.

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,
Defendant,

and

CHERYL PERICH,
Plaintiff/Intervenor,

v.

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,
Defendant.

Hon. Patrick J. Duggan
Mag. Judge Steven D. Pepe

AFFIDAVIT OF CHERYL PERICH

1. I, Cheryl Perich, am the intervening plaintiff in the above-referenced lawsuit.

2. I began my employment with Hosanna-Tabor Evangelical Lutheran Church and School ("Hosanna-

Tabor") in August 1999 as a contract elementary school teacher.

3. Hosanna-Tabor hired me as a called Kindergarten Teacher, starting in August, 2000 and I taught Kindergarten until the end of the 2002-2003 school year.

4. I taught fourth grade during the 2003-2004 school year. At the end of the 2003-2004 school year I was assigned to teach the third and fourth grades for the 2004-2005 school year. Since I was sick with a hard to diagnose illness, I went on disability leave before the 2004-2005 school year began, but was promised that my job would be there for me when I got well.

5. I was not required to be a member of the Hosanna-Tabor Evangelical Lutheran Church in order to be employed as a contract or called teacher for the school. My duties also did not include serving in a pastoral role to the congregation of Hosanna-Tabor Evangelical Lutheran Church.

6. Hosanna-Tabor did not require that all of its employees or teachers be Lutheran. Members of the custodial staff and at least one teacher who worked at Hosanna-Tabor were not Lutheran.

7. As a contract teacher, and later as a called teacher, at Hosanna-Tabor, my primary duty was the instruction of students in secular subjects. The secular subjects that I taught my students included Math, Language Arts, Social Studies, Science, Gym, Art and Music.

8. My last year teaching for Hosanna-Tabor was the 2003-2004 academic year in which I taught the

fourth grade. The school day began at 8:00 a.m., and ended at 3:00 p.m., each day.

9. During my final year of teaching at Hosanna-Tabor, I was responsible for teaching the following secular subjects to my fourth grade class: Math, Language Arts, Social, Studies, Science, Gym, Art and Computer. I taught each of the core classes, Math, Language Arts, Social Studies and Science, five days per week.

10. My instruction of Language Arts in the fourth grade included Reading, English, Spelling and Handwriting. My instruction of Music included secular music theory and instruction in playing the recorder using the same music book as was used in the local public school. Unlike some other religious-affiliated schools which use books that are religiously-based in order to teach secular subjects, the books that I was assigned by the school to use in teaching my students Math, Language Arts, Social Studies and Science were secular books.

11. In addition to spending the vast majority of my school day teaching my students secular subjects, I also taught a Religion class four days per week for a period of about 30 minutes per day. The Religion program was given to me by the school and I taught from the materials that were provided to me.

12. Hosanna-Tabor did not require that its Religion program be taught by a Lutheran, by a called teacher or by a teacher who had received a Colloquy. The year before I began teaching the fourth grade, the fourth grade teacher who taught Religion was not a Lutheran, had had not received a Colloquy, and was not a called teacher. I also taught the Religion

program before I became a called teacher and before I received my Colloquy.

13. During the period that I taught for Hosanna Tabor, I also attended chapel service with my students one time each week. The service usually lasted about 30 minutes and was seldom longer than 30 minutes. I also led two to three chapel services per school year. This involved choosing a liturgy from the *All God's People* Sing book and a Bible verse or verses to read, writing a short message based on the Bible verse(s), and deciding which songs would be sung at the service. Hosanna-Tabor did not require that the person who led the service be a called teacher or a Lutheran. I took my turn leading the chapel service when I was a contract teacher and the teacher who taught fourth grade the year before I did was not a Lutheran but she nevertheless took her turns leading the chapel services as did the other teachers.

14. During my last academic year teaching for Hosanna-Tabor, my class also spent about five to ten minutes each morning reading or listening to a short religious devotional excerpt from a book or other media. I also participated with my students in a short prayer each day in the morning, before lunch and at the end of the school day. The amount of time spent in these short prayers each day was generally no more than a total of five to six minutes per day.

15. The amount of time spent in formal study of religion, devotionals, prayers and chapel service was therefore typically no more than about 45 minutes per day.

16. I have read the July 14, 2008 Brief in Support of Defendant Hosanna Tabor Lutheran Church and School's Motion for Summary Judgment with Respect

to the Plaintiff EEOC's Complaint and Count I of Intervenor, Plaintiff Cheryl Perich's Complaint.

17. Defendant states in its July 14, 2008 summary judgment brief at page 15 that teachers in the colloquy program at Concordia University who are seeking enrollment on the Minister of religion (commissioned) roster, typically take eight specific classes. However, these classes were not required in order for a teacher to teach Religion at Hosanna-Tabor school. I taught the religion program at Hosanna-Tabor before I received my Colloquy or my call and did not need the university classes to be able to do so. Further, Hosanna-Tabor had a fourth grade teacher at the school, the year before I taught fourth grade, who was not Lutheran, did not receive a Colloquy and was not a called teacher. She nevertheless taught the Religion class using the material provided by Hosanna-Tabor.

18. On page 16 its July 14, 2008 summary judgment brief, Defendant quotes from my Supplement to the Diploma of Vocation (Exhibit L to the brief) and asserts that the document is my job description. The material quoted, and the Supplement to the Diploma of Vocation itself, is not a complete description of my duties as a teacher for Hosanna-Tabor. In fact, the Supplement to the Diploma of Vocation does not even refer to the many duties I had at the school which had nothing to do with Religion, such as the majority of the time I spent at work teaching secular subjects from secular materials.

19. Defendant asserts on page 16 of its July 14, 2008 summary judgment brief that, on the Personnel Information Form attached to the brief as Exhibit M, I "listed experience with several Christian specialties." Hosanna-Tabor's Exhibit M is a form that teachers

fill out to let schools know what type of skills the teacher has. I filled out the form in June 2005, after my employment with Hosanna-Tabor had been terminated.

20. The "specialties" and other areas of experience on the second page of Hosanna-Tabor's Exhibit M are not denominated "Christian" specialties or experience, as Defendant alleges. Further, the term "gifted", as I understood the term used on that form', is an educational term, not a religious term, and refers to programs for children who are considered to be "gifted" in the sense of being well above average in both intelligence and ability. The reference to "Group Song Leader" on the form refers to my experience as a group song leader in the Cub Scouts and Boy Scouts programs, not to any position in the Lutheran church or in any place of employment. The reference to individual instruction was also not read by me to refer in any manner to Christianity.

21. The information on page two of Hosanna-Tabor's Exhibit M was also not intended by me to refer to, and did not to refer to, my responsibilities as a teacher for Hosanna-Tabor. My experience with respect to Sunday School and Vacation Bible School was obtained through volunteer work for churches other than Hosanna-Tabor Evangelical Lutheran Church and School, and was not a requirement of my employment by Hosanna-Tabor. The majority of persons who performed that work with me were not teachers, and I was not a teacher when I first worked as a volunteer at Sunday School and Vacation Bible School, but was instead still in high school.

22. The reference to "Min[istry] to Families" on Hosanna-Tabor's Exhibit M was also not a reference to my job responsibilities at Hosanna-Tabor, or a

reference to myself as "Minister" who has a ministry to families. I believe that every person, Christian or not, has opportunities to minister to others. I was not required by Hosanna-Tabor to minister to families. Nevertheless, I indicated on the form that I have experience in ministering to families in case any employer viewing the form would be interested in that information for purposes of employment at a school or in connection with possibly helping with an extracurricular activity such as the Scouting program.

23. Defendant quotes me on page 17 of its July 14, 2008 summary judgment brief, as stating in Hosanna-Tabor's Exhibit N to the brief, that "Education ministry is special not just because of the devotional time and the religion class, but because the teacher can bring God into every subject taught in the classroom." While this is true, the reality of my situation as a teacher at Hosanna-Tabor was that although I was not *prohibited* from bringing God into every subject, as I may have been if employed at a public school, I was so busy teaching the secular class material each day that there was little time or opportunity to discuss religion within those subjects.

24. I recall that I had one opportunity, discussed in Hosanna-Tabor's Exhibit N, to talk to a student about God during an English class. The discussion took place on a single day and involved only the one student, not the entire class. In addition, I recall on one occasion, during Science class, when we were studying Outer Space and the Planets, I mentioned that "God sure made a wonderful world for us." I also recall that during the entire 2003-2004 academic school year, two students asked questions about God during Social Studies. These questions were answered on the day they were asked and the subject did not

arise again in my class. There were no other instances where the subject of God came up with me during the teaching of secular classes at Hosanna-Tabor during my final academic year at the school,

25. Defendant quotes me in its July 14, 2008 summary judgment brief at page 17 as stating in Hosanna-Tabor's Exhibit N to the brief that "[A]n Educational Ministry also opens the door to sharing the Gospel Message with parents." Although I have the opportunity to share the Gospel Message with parents of students, this was not one of the duties of my position. Further, the example I discussed in Exhibit N, where I sat with a parent after the last parent-teacher conference of the day reviewing the Bible and a small catechism, was the only time that I spent such time with a parent. Parent-teacher conferences are instead spent talking about the student's progress in the classroom and, if there is anything the student needs to improve on, how the parent can help.

26. Defendant discusses the Dispute Resolution of the Synod in its July 14, 2008 summary judgment brief at page 19. I was not aware of the resolution policy until 2008, years after my 2005 termination, and I never agreed to be bound by it.

The above stated facts are based on my personal knowledge, and, if I am called as a witness at trial, I am competent to testify as to these facts. I declare under penalty of perjury that the foregoing is true and correct.

Cheryl Perich
Cheryl Perich

Executed on: August 5, 2008.

EXHIBIT 6

Hosanna Tabor Lutheran Church and School

The Lutheran Church - Missouri Synod
9600 Leverne, Redford, Michigan 48239

Church Phone (313) 937-2424
Fax (313) 937-2173
School Phone (313) 937-2233

Dr. Steven M. Eggers Pastor
Mrs. Stacy Flock Principal

2/22/05

Dear Mrs. Perich,

Your actions of 2/22/05 are regrettable, to say the least. By emailing Mrs. Hoeft at her work email at 9:03 pm on 2/21/05 it is clear that your intent was not to return to work, but rather to create upheaval at our school. You had already been informed at our meeting on 2/13/05 that there was no position for you, as per our employee handbook. Your behavior demonstrates your total lack of concern for the ministry of Hosanna-Tabor Lutheran School. We are therefore reviewing the process of rescinding your call. Please be advised that there is no reason for you to return to Hosanna-Tabor Lutheran School. You should have no further contact with Mrs. Hoeft regarding these matters. All future inquiries should be to Mr. Scott Salo at (313) 600-6638.

This letter is sent by unanimous consent of the Hosanna-Tabor Lutheran School Board of Education.

Scott Allen Salo
Scott Allen Salo

EXHIBIT 7

2/22/05

Cheryl Perich,

Due to your improper notification to return to work, we are asking that you continue your leave on Tuesday, February 22, 2005 in order to allow the congregation a chance to develop a plan for your possible return. The congregational leaders will attempt to meet this evening to develop this plan. You will be informed of the steps that will be in place to allow for your possible return as soon as they are developed.

Sincerely,

Scott Allen Salo
Scott Allen Salo
School Board Chairman

Stacy J. Hoeft
Stacy J. Hoeft
Principal

HOSANNA-TABOR BOARD DIRECTOR'S MEETING MINUTES

MEETING DATE: January 18, 2005

Members present; Jim Pranschke, Bob Cochran, Judy Cochran, David Hardoin, Stacy Hoeft, Ron Kapanke, Sheila Simpson, Frank Weide, Kurt Ostrander

1. Opening Devotion by Jim Pranschke.
2. Acceptance of November's meeting minutes—motion by David Hardoin, second by Sheila Simpson, unanimous by Board.
3. 2005 Goals
   a. Call a new full-time Pastor.
   b. 50th Anniversary celebration.
4. Disability Policy—Jim Pranschke and Stacy Hoeft
   a. Refer to the Hosanna-Tabor Disability Policy attachment, which is to be presented to the congregation at the Shareholders meeting on January 30, 2005.
   b. The revised disability policy was approved by a unanimous decision.
   c. Pastor Eggers—the board will recommend to the voters on January 30th to continue paying benefits through February 2005. Salary payments have already ceased as of December 2004.
   d. Cheryl Perich - the board will recommend to the voters on January 30th to continue paying benefits through February 2005. Salary payments have already ceased as of December 2004.
5. LCMS Constitutional Amendments—Jim Pranschke

a. Information about the two issues will be available for review before and during the Shareholders meeting on January 30th.

6. Items for Shareholders meeting

a. Location will be in the church 15 minutes after the service.
b. Lunch will not be served.
c. Babysitting will be available by Julie Ostrander and Ariana Hardoin.
d. The Disability Policy will be discussed.
e. Review the petition by Jim Hoeft to change his status as a. Called teacher to a Contract teacher.

7. Items for Discussion—Board Reports

a. The disability policy was mainly discussed during this meeting.

8. Other Business

a. 40 Days of Purpose—postpone program until a new Pastor is here.
b. Sexual Misconduct Coverage—we need someone to lead this issue to set a new policy at Hosanna-Tabor, which is now required by our insurance carrier. Stacy Hoeft is to ask other District Schools how they handle this new requirement and Judy Cochran is to check with other Youth Groups.
c. School Board—Scott Salo will continue to serve as the School Board Chairperson after his marriage to Andrea Garfield on December 18th. There is not a conflict of interest with Andrea being a teacher at Hosanna-Tabor, and Scott will not vote on any issues involving Andrea.

8. Financial Reports—Frank Weide and Jim Pranschke
   a. Refer to the handouts.
9. 2005 Budget and Projected Receipts
   a. Projected income is approx. $530,753.00 and budget is $543,918.00, which equals a deficit of $13,165.00. The proposed income included a 5% increase in envelope offerings, which is conservative. The Board of Directors approved this budget in the November meeting.
   b. The 2005 Budget was approved; motion by David Hardoin, second by Ron Kapanke, unanimous acceptance.
   c. Items to be discussed at the next Board of Directors' meeting:
      1. 30% of Pastor Eggers' salary will be paid through what date?
      2. If Cheryl Perich's 30% salary coverage discontinues after 90 days, the when should Pastor's discontinue?
      3. The Employee handbook should treat the two issues the same.
      4. Money should be raised for Cheryl Perich, just like we did for Pastor Eggers.
      5. The Congregation would like to be a part of the decision making for Pastor Eggers and Cherly Perich after the Board of Directors meet to discuss these issues.
10. Business/Announcements
   a. Stacy Hoeft announced the Advent By Candlelight Service will be held in the Church, and the Fellowship Gathering for desserts will be in the gym immediately following the Service.

b. Millie Cosner reminded everyone to continue dropping off all "papers" in the parking lot dumpster.

c. David Hardoin announced the Sunday School Christmas Program will be held on Wednesday December 15th and the Sunday School Classes are averaging 25 children each week.

d. Judy Cochran announced she would like more parents to sign-up for the Mexico Mission Trip for 2005.

e. Virginia Meyers announce the LCF Christmas Party will be held on December 17th at Mama Mia's at 6pm. Cost is $13.00 per person. Good Will offerings will be donated to Gary Ellul.

11. Adjournment/Closing Devotion—adjourned with The Lord's Prayer.

Prepared by Kurt Ostrander, Secretary.

HOSANNA-TABOR BOARD DIRECTOR'S MEETING MINUTES

MEETING DATE: November 16, 2004

Members present: Jim Pranschke, Stacy Hoeft, Scott Salo, Frank Weide, Loren Krause, Sheila Simpson, Judy Cochran, Paul Pranschke, Ron Kapanke, Kurt Ostrander

1. Opening Devotion by Stacy Hoeft.
2. Acceptance of October's meeting minutes—motion by Frank Weide, second by Scott Salo unanimous by Board.
3. 2005 Budget and Projected Receipts—Jim Pranschke
   a. Projected income is approx. $519,000.00 and budget is $595,000 00, which equals a deficit of $76,000.00.
   b. The deficit was decreased to $12,100.00 after discussion of the following items:
      1. Salaries and Medical Benefits.
      2. Maintenance and Supplies.
      3. Outreach Advertising.
      4. Telephone Advertising.
      5. Office Supplies.
      6. Tuition Increase.
      7. Fundraisers.
4. Disability Policy—Jim Pranschke and Stacy Hoeft
   a. Cheryl Perich will continue to be paid 30% of her salary through the Appeal Process, which will be the end of December 2004 or sooner. The Appeal was received and they have 45 days to make a decision.

b. The Salary Review Committee met recently and made the following changes to this policy (language to be finalized by next Board of Director's Meeting):
   1. Extend Group Benefits plus 30% salary up to 90 days from point of disability, plus health and worker's benefits.
   2. The Board of Directors will review the possibility of a further extension, on a case-by-case basis, which may also go to the Congregation for a decision as in Pastor Steve's case.
   3. A written appeal is required to extend benefits beyond 90 days to the Board of Director's. If it's a budget issue, then the Congregation will decide.

5. 40 Days of Purpose—Spiritual Growth Idea—Ron Kapanke
   a. Beginning January 2005, a six week program will begin for anyone who would like to learn how to spiritually Grow in God's Word through this study.
   b. The meetings are 2 hours long each week for a total 6 weeks. The study time each week is basically "devotion time" with God as you prepare for the weekly meetings.
   c. Donations will be accepted to cover the costs of this program.

HOSANNA-TABOR BOARD DIRECTOR'S MEETING MINUTES

MEETING DATE: October 19, 2004

Members present: Jim Pranschke, Stacy Hoeft, Scott Salo, Frank Weide, Loren Krause, Sheila Simpson, Bob Cochran Judy Cochran, Sue Wehrenberg, Kurt Ostrander

1. Opening Devotion by Jim Pranschke.
2. Acceptance of September's meeting minutes—motion by Frank Weide, second by Bob Cochran unanimous by Board.
3. Disability Policy—Jim Pranschke and Stacy Hoeft
   a. Cheryl Perich visited another doctor and is on new medication. The appeal is still in process.
   b. The Salary Review Committee is to meet before the November meeting to propose a new policy for staff employees covered by medical and disability benefits.
4. Stewardship materials to be displayed for Town Meeting on 10/31/04.
   a. "Stepping Up" stewardship materials will be displayed during the meeting.
   b. Sandwiches will be provided by Sue Wehrenberg and babysitting will be provided by Debbie Pranschke and the Youth Group.
   c. Quarterly Statements—determine if families would like to start receiving these again.
5. Items for Discussion—Board Reports
   a. Elders: Due to Pastor Eggers' current condition, the Elders are to meet soon to discuss getting

together a Call Committee for a full-time Pastor versus two part-time Pastors.

b. Elders: The Salary Review Committee needs to determine financial obligations for Sandie Eggers if Pastor Eggers continues to not do well.
c. Trustees: The lack of church and school maintenance is becoming a major issue. Stacy Hoeft has recently been coordinating daily maintenance issues, but someone else needs to be responsible for this task. Sheila Simpson is to investigate a "helper" for our use,
d. Trustees: The Salary Review Committee is to review the secretarial hours policy to maintain a more consistent office coverage during the week.
e. School Board/Principal: Andrea Garfield and Scott Salo are getting married on 12/18/04 Scott will continue as School Board Chairman until June 2005 and then the congregation will decide if there is a "conflict of interest" for the next term, if Scott desires to continue with this position. The Board of Director's will prepare a statement for the congregation regarding Scott Salo continuing in this position; there shouldn't be a "conflict of interest" and Scott will not vote during school board meetings if a staffing issue arises that includes Andrea.

6. Disability policy—Jim Pranschke and Stacy Hoeft

a. Cheryl Perich's insurance carrier has denied her claim for disability. The insurance company feels she should be able to perform light duty work, which includes "teaching".
b. Jim Pranschke is to research if Cheryl qualifies for social security disability.

c. The current policy states if the disability is approved, then Hosanna-Tabor will pay the difference (usually 30%). If the disability is denied, then Hosanna-Tabor has no obligation.
d. The policy should include limits for disability coverage; short and long term. The employee handbook committee is to make a decision in October 2004.
e. The salary review committee needs to make decisions for the total cap of disability insurance and the coverage amount & limits if insurance denies a claim.
f. Cheryl Perich will still receive 30% of her salary in Sept., as decided last month.
g. Sheila Simpson motioned to also pay Cheryl 30% of her salary for October, second by Frank Weide and unanimously approved by the board members. This is not a new policy decision.
h. Cheryl Perich needs to go directly to Worker's Benefit and appeal to the insurance carrier as soon as possible.

7. Items for Discussion Board Reports

a. Parish Education: The Sunday School program is going well. The total church attendance each Sunday should include the sunday School group before they leave the service.
b. Financial Secretary: Frank Weide is to prepare a financial projection for the October meeting.

8. Other Business—Jim Pranschke

a. Choir: Currently, there is no choir group. Due to this report, it was motioned to suspend pay after September until further notice. Second by Jim Pranschke and unanimously approved by the board members.

b. Sunday School Rally Day: David Hardoin reported were 28 attendees and then there were 21 attendees for Sunday School the following week.

c. Suggestion: First time visitors should start receiving visitor gifts again. The Elders are to meet on this in their next meeting.

9. Closing Devotion: adjourned with The Lords Prayer.

10. Next Meeting: Tuesday October 19, 2004.

Prepared by Kurt Ostrander Secretary.

HOSANNA-TABOR BOARD DIRECTOR'S MEETING MINUTES

MEETING DATE: SEPTEMBER 21, 2004

Members present: Jim Pranschke, Frank Weide, Sheila Simpson, Stacy Hoeft, Loren Krause, David Hardoin, Kurt Ostrander

Guests present: Rosemary Reschke, Tina O'Brien

1. Opening Devotion by Jim Pranschke.
2. Discussion on a new copier—Rosemary Reschke and Tina O'Brien
   a. Tina's printer is "down". It will cost approx. $40,000.00 to replace.
   b. The folding machine is also "down". It will cost. $6,000.00 to replace.
   c. Bids were received from a few companies to purchase/lease a new copier, and Konica had the best package for the price. It will cost $15,500.00 to purchase or $349.00 per month for 5 years to lease. If leased, Konica will replace the copier after 2-1/2 years without an additional cost for the newer model.
   d. Sheila Simpson is to check with her connections for a better price and then work with Tina to lease the copier. Hosanna-Tabor can also keep the existing model.
   e. Sheila Simpson motioned to lease one copier for the church and school, second by Kurt Ostrander, and unanimously approved by the board members.
   f. Thrivent will cover the lease cost for three months and the auction money will cover the lease for 2005. Future budgets will include the

yearly lease amounts, unless auction money continues to cover this expense.

3. Acceptance of November (pending), May and August Meeting Minutes—Jim Pranschke
   a. The November minutes are still outstanding. Jim to research his notes for record.
   b. The May minutes included the handbook approval. Stacy Hoeft is to provide her notes to Kurt Ostrander for record.
   c. The August minutes were unanimously approved.
4. Cash Flow Update—Frank Weide
   a. The Church will not be able to pay back the deficit program loans at the end of 2004. We will have to borrow from the church extension fund to pay these loans back.
   b. Sheila Simpson is to prepare budget sheets for everyone's use in the October meeting to prepare the 2005 budget.
5. Education expense vs. budget—Jim Pranschke
   a. This item is not in the handbook for the distribution of funds. Currently, we are over budget on this item.
   b. Jim Pranschke is to discuss this with Scott Salo and review past meeting minutes.
   c. The School Board should decide the policy and keep costs within budget.

Board of Directors
8/17/04
Principal's Report

- Enrollment as of today is 76 students.
- School board would like to request increasing pay for a substitute teacher from $54 to

$75. We are having trouble getting subs because our pay is so low.

- Cheryl Perich will be beginning a medical disability to begin the 2004-05 school year. We are unsure about the length of this disability. She has been diagnosed with Neurocardiogenic syncope. She also has an atrial fibrillation. She may be in need of a pacemaker due to problems with passing out. In accordance with Michigan State law, she is not permitted to drive for six months following her last fainting episode. She has applied for disability through Worker Benefit Plans. In order to cover her classroom we have decided not to hire a substitute to take her place. Andrea Garfield, our second grade teacher, will be teaching grades two, three, and four. In order to sufficiently teach all three grades at once she will need an aide. We have asked Marion Salo to assume this position. The position will consist of Mrs. Salo working in Miss Garfield's classroom everyday from 10 a.m. to 3 p.m. at the rate of $8.00 per hour. The total impact on the 2004 budget is as follows:

Cheryl Perich's salary to the end of 2004	$12,375
Reimbursement from WBP to end of 2004	$8662.50
Cost to pay aide to the end of 2004	$3,000 (approx.)

- Miss Andrea Garfield (soon to be Salo) has finished her colloquy. As soon as her official

documentation is completed school board will be recommending a Call for Andrea. We will also ask her to become a member of our church.

- Mrs. Ellen Mills has finished her Master's Degree.

HOSANNA-TABOR BOARD DIRECTOR'S MEETING MINUTES

MEETING DATE: AUGUST 17, 2004

Members present: Jim Pranschke, Paul Pranschke Frank Weide, David Hardoin, Stacy Hoeft, Kurt Ostrander

1. Opening Devotion by Jim Pranschke,
2. Acceptance of November and May Meeting Minutes will occur at September's meeting.
   a. The November minutes will have to be reconstructed. The Board members were asked to give Jim Pranschke a copy of their notes.
3. Cash Flow Update by Frank Weide:
   a. Interest Free Loans total $22,500.00 through July plus $1,000.00 for August
   b. Deficit Drive totals $11,700.00 with $15,000.00 as the goal. The Adopt-A-Bill Program has taken a hit due to the deficit drive.
4. Revolving Credit/Loans from Members by Jim Pranschke (Congregational Meeting Suggestions):
   a. Interest Free Loans are acceptable, but we must meet payroll requirements.
   b. Convert Funds to pay for roof repairs—use revolving credit fund to pay for roof.
   c. Discussion: cash flow must be carefully supervised in order to pay back interest free loans to members. Jim is to make sure all members have received a promissory note—check with Sheila Simpson.
5. Items for Discussion—Board Reports:
   a. Trustees: a few ash trees are dying out, so to prevent damage to the church roof, estimates

have been received to remove trees and stumps; $3,400.00 for two trees and $4,200,00 for seven trees. The Property Improvement Fund (budget = $9,000.00) will be used for this expense.

b. Trustees: the GM Volunteer had developed a few personal problems over the summer and it has potential to affect his work performance. Scott Salo and Paul Pranschke are closely monitoring his work schedule and will report any updates to the Board of Director's as required.

c. School Board: Stacy Hoeft reviewed the Principal's Report, including Cheryl Perich's diagnosis with Neurocardiogenic Syncope. Cheryl is experiencing several fainting spells a day, so she is beginning this school year on medical disability.The Board of Director's is to revisit the situation at the Sept. meeting to verify salary requirements as noted in the Handbook.

d. School Board: the Board unanimously approved the substitute teacher's salary to be increased to $75.00 a day.

e. Sunday School: David Hardoin stated the possible volunteers for the next year as follows:

1). Sunday School Superintendent = Barbi Hardoin.

2). VBS = Debbie Pranschke and John Nurmi.

CERTIFICATION OF MEDICAL RECORD COPY

I, Donna Schlemmer of Bactes Imaging Solutions am authorized to certify on behalf of Northpointe Heart Center (name of facility) attached copy of the medical record of services rendered:

Cheryl Perich
(Name of Patient)

3/21/55
(Date of Birth)

Northpointe H.C. (name of facility) is a duly licensed health care facility. Medical records are kept in the ordinary course of business.

I hereby certify that attached is a true and complete copy of the medical records kept by the Northpointe H.C. (name of facility), under Michigan General Law. These may be admissible as evidence under Michigan General Law.

Signed under the pains
and penalties of perjury this

8th day of July 2008

Donna Schlemmer
(Signature)

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Investigative
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A. Robert Spitzer.
Nancy R. Mann, M.D.

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Neurological Disorders,
Electromyography,
Electroencephalography,
Evoked Potentials,
Traumatic Brain Injury
Rehabilitation
Physical Therapy

PERICH, CHERYL
10-03-06 OFFICE

OFFICE NOTE:

She was seen today on an urgent basis because of some symptoms that happened last night. She began to develop some tremulousness of her arm while she was holding a frying pan. Despite otherwise trying to rest, the tremulousness moved to the other side and involved her other arm, then her right and her left leg and then when she was supine, both of her legs. At no time during this episode did she have any loss of consciousness. The symptom occurred transiently at her right lower extremity this morning as well. Today on her exam there is no hyperreflexia, no incoordination and no asterixis. I don't detect anything that clearly indicates a metabolic encephalopathy, nor anything that indicates cord compression, stroke or any upper motor neuron lesion that would indicate clonus. There is nothing that suggests a seizure in view of the fact that she never lost consciousness and was clearly alert at all times.

I suspect this was some transient fatigue or metabolic process, maybe related to the electrolyte changes that had been going on or maybe somehow related to her narcolepsy. In any case, the problem appears to have resolved spontaneously and I don't think we are actually going to find a clear answer. I am sending off a bunch of blood studies including CBC, LFT's, electrolytes, calcium and magnesium and hemoglobin A1C to make sure we are not missing any substantial metabolic disturbance. Given the salt load from the Xyrem and the use of occasional Lasix to normalize this, we may have introduce some electrolyte disturbance that needs to be corrected. If everything goes well I will see her at her follow-up visit.

In the meanwhile, we also discussed tachyphylaxis to the Requip, which is clearly happening. She went from 0.5 mg to 1 mg and now probably will eventually become resistant to this as well. I explained to her the regimen for skipping the medication for several days at a time so that we can bypass the issue of tachyphylaxis of the dopaminergic agent. I expect again to follow-up with her at the follow-up visit and gradually develop a lifelong management regimen for the restless leg syndrome.

A. Robert Spitzer, MD
ARS/ko
Cyberscript (www.cyberscript.biz)

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PERICH, CHERYL
07/07/05

OFFICE NOTE:

I am seeing Ms. Perich on an emergent basis because Dr. Spitzer is not in the office. He follows her for migraine headaches, narcolepsy and essential tremor. She is here today because she is worried that she may have a sleep attack in the afternoon. She feels that she almost falls asleep in the late afternoon or early evening.

We reviewed her medications extensively and what we have decided is that she will increase her Provigil from 200 mg, half a tab in the morning and half a tab at noon to half a tab in the morning and full tab at noon. With this larger dose at noon it may carry her through the evening slump when she is afraid that she will have a sleep attack. We talked about another alternative of staying on half a tab at midday, but taking it a little later, such as 2 p.m. She is worried about that because she occasionally is late with the Provigil and feels that she has a near sleep attack or cataplexy.

We will keep all of her other medications the same for now. She is using Lasix and she finds that if she takes it every night she sleeps much better. She is worried about that because Dr. Spitzer instructed her to take it only roughly every other night. We will go ahead and use it on a nightly basis, but we will check her electrolytes today. She has had no evidence of hypotension related to the Lasix use.

/s/ Elizabeth C. Smith
Elizabeth C. Smith, MD

ECS/cll

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PERICH, CHERYL
07/26/05

OFFICE NOTE:

She had some minor problems while I was away, that required some very slight adjustment of her medication. Dr. Smith adjusted the Lasix and she is sleeping well. She is adjusting to the pattern now. Some days she is a little bit tired, but I explained to her that this is simply normal variation and that everybody has days where they feel a little more tired. She is not having any significant symptoms of narcolepsy at this time. In fact, the problem is now coming under very good control. She has not had any significant episodes for quite a while. I explained that she simply needs to pace herself occasionally just like any other person independent of any medical issues. Her migraines are under good control at this time. Her essential tremor is under good control. We're working on multiple neurological problems all of which are finally coming under control. There is a component of restless legs that may yet require some intervention. However, I'm just beginning to

stabilize her and so I want to make only gradual changes in the future. I'm considering dopaminergenic therapy in the future at her follow up visit in several months.

/s/ A. Robert Spitzer
A. Robert Spitzer, MD

ARS/pc

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PERICH, CHERYL
10/24/05

OFFICE NOTE:

Her narcolepsy remains under good control with the Xyrem, not having any daytime symptoms. We had a long, obsessive visit and she needs to continue to stay on the Anafranil. Her migraines generally had been doing fairly well though she had 5 migraines in the last week or two. She has been taking Relpax, which is working well. I did provide her information on rebound headaches. She has been under a lot of stress and this may be a contributory factor and before I change her regimen I would like to see how things evolve over time. She is on Topamax which she immediately wanted to discontinue. I advised her she is welcome to do this but I think her headaches would, of course, flare and get a lot worse. She continues to have tremor, which is moderately well controlled. She has noticed an interesting association between temperature and the tremor. When she washes her hands with warm water or she is washing dishes with hot water or cooking on the

stove with heat, her tremor significantly worsens. At this point, I am going to see her at 6 month intervals and continue to manage the various neurological issues.

/s/ A. Robert Spitzer
A. Robert Spitzer, MD

ARS/pc

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PERICH, CHERYL
5/31/05

OFFICE NOTE:

She has been having a lot of problems recently and came in because there were many concerns.

She has been having increase in her headaches, which I frankly think might be a side effect of the Xyrem. The amitriptyline is not holding her and so she has been phasing it out and I am going to eliminate it. I am going to try some Topamax as an alternative. Unfortunately, because she really needs the Xyrem for her narcolepsy, we are going to have to come up with some regimen that works on the migraines in addition to the narcolepsy.

She is having a great deal of daytime somnolence and increased the Provigil to 1.5 tablets a day. It turns out that the problem was later in the afternoon. I suggested that she take a half in the morning and a half at noon rather than the larger 1.5 pill dose in the morning. This may give her the desired later benefit in the day without having to increase the total

dosage. I think the increased total dosage is resulting in an exaggeration of her essential tremor. This was being helped by the Inderal but then the Inderal stopped working, which I think was possibly related to the increase in the Provigil dose. I am having her cut back on the Provigil dose, space it out a little more evenly, and I am starting her on a little bit of Mysoline. Over time, I am going to have to fine-tune the entire regimen to minimize the medications and optimize them. Unfortunately, there are some conflicting needs here based on her different neurological problems. I think there is an anxiety and psychogenic component that is not causing the tremor but is certainly, in my opinion, exaggerating it.

/s/ A. Robert Spitzer
A. Robert Spitzer, MD

ARS/pc

Cyberscipt (www.cyberscript.biz)

Integrated Disability Management

Mailing Address:
P.O. Box 180151 Subgroup 389
Plantation, FL 33215-9151
Fax # (954) 452-4601
Phone # (954) 452-4000 Ext. 2849
(800) 707-3515

Case # 1351976

Initial Physician Report

As the Short Term Disability Plan (STD) Administrator for Unisys, it to our responsibility to obtain complete, and detailed medical information in order to determine if your patient qualifies for STD benefits (i.e. Salary Continuation). Please complete and return to us ASAP at the above fax number.

Patients name: Cheryl Perich D.O.B.: 3-21-55

To be completed by Physician:

Initial treatment date: 8/02/04

Last appointment: 8/19/04

Diagnosis: Syncope ICD-9_____

Complications: _____

Objective physical findings which render your patient disabled from their own occupation: patient has frequent syncope episodes occurring daily

Diagnostic Tests and Result: (Please attach actual test results when possible)_____

Tilt Table, Test 06/04 further testing to encompass neurological/physical [Illegible]

Hospitalization: 8/6/04

Treatment Date: From: 8/6/04 to 8/ /04

Treatment Plan: Continue Norpace [Illegible] PCP for further noncardiac [Illegible] for syncope

Medications: Norpace SR150 BD

Has patient undergone surgery? No Date_____

Procedure_____

Next Appointment Date: with family doctor

Projected RTW Date: unknown-needs further workup

What prevents your patient from performing the essential functions of his/her job? patient passes out would be unable to perform pertinent duties due to illness

Able to Work Full Duty: Yes__ No: X

Able to work with restrictions; Yes__ No: X

If yes please list specific restrictions: _____

_____

_____

These restrictions will apply until Oct 4 2004 (date)

Dr. Kou Cardiology _____

Attending phyisican Specialty Tax I.D.

/s/ [Illegible] 8/27/04

Signature Date

Thank you, /s/ [Illegible]

with case manager
/s/ [Illegible]

****Confidential****

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NORTHPOINTE HEART CENTER

Patient Activated Trans Telephonic TCG Report

Name	Perich, Cheryl S
Date of birth	03/21/1955
Patient Number	112529
Age	49
Gender	Female
Test Date	09/17/2004
Attending Phy	WHK
Referring Phy	Dr. D White 705 Barclay Cir Ste 110 Rochester Hills, MI 48307
Reason for Test	Syncope
Medications	Norpace, Synthroid, Iron, Magnesium, Albuterol
Technician's Comments	None
Surveillance Period	08/09/2004 to 09/09/2004

#	Date	Time	Symptom
1	08/09/2004	9:36am	Baseline transmission
2	08/09/2004	11:13am	Unknown
3	08/09/2004	4:56pm	Felt dizzy and lightheaded/chest pains
4	08/09/2004	6:08pm	Asymptomatic recording/accidental
5	08/10/2004	8:26am	Asymptomatic
6	08/10/2004	11:53am	Shaky
7	08/10/2004	4:55pm	Very weak
8	08/11/2004	12:03pm	Slightly lightheaded, felt weak
9	08/11/2004	1:29pm	Strange feeling, little lightheaded, weak, tingling face

10	08/11/2004	6:50pm	Weak
11	8/12/2004	3:40pm	Feeling weak
12	08/12/2004	5:01pm	Felt faint, lightheaded
13	08/12/2004	9:23pm	Passed out, nauseated
14	08/12/2004	9:33pm	Follow-up recording
15	08/13/2004	7:29am	Lightheaded, weakness, dizzy
16	08/14/2004	9:35pm	Not feeling well
17	08/15/2004	1:06pm	Dizziness, sweaty, chest pressure and arm pain
18	08/15/2004	3:22pm	Felt strange
19	08/15/2004	7:55pm	Legs aching, weak, lightheaded, disoriented, couldn't think or concentrate
20	08/15/2004	9:22pm	Lightheaded, nauseous
21	08/16/2004	10:27pm	Lightheaded, nausea
22	08/16/2004	12:00pm	Lightheaded, not feeling well, woozy, felt faint
23	08/16/2004	12:59pm	Strange feeling
24	08/16/2004	1:30pm	Felt tired, chest hurting
25	08/16/2004	2:06pm	Chest and neck pain
26	08/16/2004	3:27pm	Felt strange
27	08/16/2004	4:05pm	Feeling strange
28	08/16/2004	9:30pm	Asymptomatic
29	08/17/2004	11:26pm	Lightheaded
30	08/17/2004	4:41pm	Feeling strange, passed out
31	08/17/2004	4:45pm	Follow-up recording
32	08/18/2004	11:52am	Lightheaded
33	08/18/2004	3:32pm	Felt strange
34	08/18/2004	10:25pm	Felt strange

35	08/19/2004	8:47am	Lightheaded
36	08/20/2004	10:04am	Weakness, lightheaded
37	08/20/2004	12:43pm	Asymptomatic
38	08/20/2004	4:56pm	Rapid heartbeats
39	08/21/2004	7:58pm	Lightheadedness
40	08/22/2004	12:15pm	Asymptomatic
41	08//22/2004	7:59pm	Lightheaded, nauseous, felt strange
42	08/23/2004	2:34pm	Lightheaded
43	08/23/2004	4:45pm	Lightheaded
44	08/24/2004	8:22am	Asymptomatic recording
45	08/24/2004	4:24pm	Lightheaded, headache
46	08/25/2004	8:20pm	Passed out for 7 minutes, lightheaded, finger tingling
47	08/25/2004	8:24pm	Follow-up recording
48	08/27/2004	4:58pm	Asymptomatic
49	08/28/2004	3:04pm	Passes out, rapid heartbeat and lightheaded
50	08/28/2004	3:14pm	Follow-up recording
51	08/29/2004	11:54 am	Felt strange, weak
52	08/29/2004	4:53 pm	Asymptomatic
53	08/32/2004	1:57 pm	Lightheaded
54	08/32/2004	2:23 pm	Passed out, unconsciousness, approximately 10 minutes
55	08/31/2004	2:16 pm	Follow-up recording
56	09/01/2004	2:29pm	Weak, faster heartbeat
57	09/02/2004	4:46 pm	Passed out
58	09/02/2004	4:48 pm	Follow-up recording

59	09/02/2004	6:02 pm	Passed out for a minute, lightheaded, unable to see well
60	09/02/2004	6:07 pm	Follow-up recording
61	09/02/2004	6:46 pm	Passed out
62	09/02/2004	6:49 pm	Follow-up recording
63	09/05/2004	2:28 pm	Lightheaded, nausea, syncope
64	09/05/2004	2:43 pm	Follow-up recording
65	09/06/2004	4:11 pm	Passed out
66	09/06/2004	4:14 pm	Follow-up recording

Interpretation:

PERICH, CHERYL S 112529

A King of Hearts monitor was performed between 8/9/0 and 9/6/04 and a highly symptomatic diary is returned with incessant episodes of shakiness, weakness, strange feeling, syncope, near syncope, and lightheadedness more or less the entire duration. Patient generated voluminous transmissions, however, show sinus rhythm with physiologic rate changes and an extremely rare PVC.

Vellappillil Gangadharan MD
VG /cjf/lam D:09/21/2004 T: 09/22/2004

[1] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 2:07-cv-14124

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

vs.

HOSANNA TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,
Defendant.

and

CHERYL PERICH,
Plaintiff/Intervenor,

vs.

HOSANNA TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,
Defendant.

Hon. Patrick J. Duggan

---

[2] The Deposition of CHERYL PERICH,

Taken at 31780 Telegraph Road, Suite 200, Bingham Farms, Michigan,

Commencing at 9:07 a.m.,

Thursday, July 3, 2008,

Before Cheri L. Gleyre, RPR, CSR-6548.

APPEARANCES:

OMAR WEAVER

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Appearing on behalf of the Plaintiff.

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Appearing on behalf of the Defendant.

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Appearing on behalf of the Plaintiff/Intervenor.

[4] Bingham Farms, Michigan
Thursday, July 3, 2008
9:07 a.m.

CHERYL PERICH,

was thereupon called as a witness herein, and after having first been duly sworn to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

MR. WARE: Hi. Good morning, Cheryl.

THE WITNESS: Good morning.

MR. WARE: I'm going to abbreviate the preamble that Mr. Weaver and most attorneys normally give before a deposition because I know you've sat through the majority of the depositions, but first of all, have you ever had your deposition taken?

THE WITNESS: No, I have not.

MR. WARE: Well, first of all, we'll just ask if I ask a question that if you can answer, if it calls for a yes or no answer, say either yes or no and not uh-huh or uh-uh, and that's just to help the court reporter. In addition, if I'm talking and you're trying to answer a question, just kind of either wait until I finish, and the same thing with you, if you're trying to finish up something just kind of let me know

* * *

[18] Q. At Emmanuel were you a contract or co-op teacher?

A. I was a contract teacher and I was hired with the agreement that I would be taking college classes toward—so that I could be working toward becoming a call teacher.

Q. What are colloquy classes?

A. Colloquy classes are classes that a person takes if they didn't go to a Lutheran college to be able to—the classes that you—like religion type classes that you would have had if you had gone to a Lutheran college, although they—in the colloquy I now understand that they have expanded so that colloquy people are now taking actually more classes than the people who actually go to the Lutheran college. I took eight—I had to take eight classes and the other people that went to the Lutheran college took six.

Q. Now, let me—

A. And then once you take the colloquy classes you—[19] you're—

MR. ROACH: Mrs. Perich, please focus on the question. I think you answered it.

BY MR. WARE:

Q. I guess what I'm asking is are these religion classes, what you call colloquy classes, are they religious courses?

A. Most of them are.

Q. Are they doctrinal courses? Do you understand what I mean by doctrinal, I mean, is it something that indoctrinates you into the Lutheran—

A. Well, I'm a lifetime Lutheran so I already don't—so I don't—didn't really need to be indoctrinated into what the Lutheran faith is, but the classes are just—some of the classes are—you know, there's an Old Testament class, a New Testament class and various

different classes that give you a deeper understanding of—I don't remember all the different classes, but there's different classes that—

Q. Would it be fair to characterize those as religious classes or Bible classes?

A. Most of them are religious type classes, yes.

* * *

[24] Q. Okay. So you were working on your colloquy from 1993 to 1999?

A. Right.

* * *

[26] So when you got hired at Hosanna-Tabor you didn't go through the district at all?

A. No, because I personally knew someone that knew about a position.

Q. And when you got offered the contract or the position did they specify what grade you were being hired for?

A. Yes, it did specify that I was being hired as a kindergarten teacher.

Q. Any other grades or work?

[27] A. The other work was—I forget the exact wording, but it was to work with missions.

Q. You said, what?

A. Missions. I can't remember the exact wording of it, but I was to promote the missions and the offerings for missions and things like that.

Q. Okay. So when you began employment in August of '99 what grades were you teaching?

A. Kindergarten.

Q. Anything else?

A. No, that was in my contract that I was contracted for—as a kindergarten teacher.

Q. Did you have any other assignments besides teaching the kindergarten class?

A. I had the—working as the mission—the missions—I can't think of the name they called it, but the missions—saying what missions we're going to—the offering were going to go to for the chapel offerings each month and promoting those with the children and—

* * *

[28] Q. You returned in the year of 2000 to Hosanna-Tabor?

A. Yes, I did.

Q. Okay, And in 2000 were you offered a contract or were you offered a call?

A. I don't remember the exact year that I was offered the call.

Q. Let's see if I have something. Well, let me show you this. You completed your colloquy between—on February 29th of 2000?

A. Okay. I was—on February 29, 2000 I was—according to this letter I was now eligible to be considered for a call.

Q. Okay. So that means you had completed your colloquy?

A. I had previously completed my colloquy, but they had to publish my name in several periodicals and things like that first before they could say I was eligible.

Q. Okay. So you had completed your colloquy but you still needed to be published or added to the district [29] roster in February of 2000?

A. Right.

* * *

[30] Q. Do you know if you had informed them at that time that you had completed your colloquy?

A. I know that as soon as I completed it I did let them know.

Q. So at the end of your—go ahead, I'm sorry.

A. I was very excited that I completed it after those long years of working on it, and both the pastors and the—the two pastors and the principal was very excited for me also.

Q. Now, at the end of your first year do you remember what position you were offered for the second year?

A. Yes, kindergarten teacher.

Q. Okay. And was that a call or—

A. As I said, I don't remember when they offered me the call.

Q. Okay. I'm trying to get something with a date on it. I've got your documents from your personnel file. Some of this doesn't have dates. See if that refreshes your memory.

A. There's the name of the—I couldn't remember. I [31] knew it was mission something. Mission coordinator was my other duty.

Q. Did that refresh your memory as to whether you were asked to come back as a contract or call teacher?

A. It just says August 15, 2000 general call information, so it would have been as a call teacher that I came back on August 15th of 2000 as—and I was called to serve specifically as a kindergarten teacher.

Q. Okay. And you testified earlier that you were very excited about completing your colloquy, right?

A. Yes, I was.

Q. Because you had worked on it probably nine years to complete that, right?

A. A number of years. It was quite a long time.

Q. And that was all toward receiving a call, right?

A. Yes.

Q. Okay. So when you were offered the call was that something that you wanted, I mean, was it voluntary, was that your whole objective was trying to get with a school where you could receive a call?

A. Yes. My understanding was that all Lutheran schools wanted you to be a call—called teacher, and the only reason why they had any contract teachers were that sometimes they couldn't find enough called teachers so they had to hire a contract teacher, but

* * *

[120] Q. Now, do you know what the symptoms affecting narcolepsy are?

A. Yes, I do.

Q. And what are those?

A. Well, a person can go into a deep sleep and when they go into the deep sleep you can't—people don't—can't wake you up until you're done sleeping, and you don't hear them or anything, and that can happen any time throughout the day. The other thing that can happen is cataplexy and cataplexy is you can—either one set of muscles or several sets of muscles or all your muscles can relax, and if one set of muscles relaxes your head can kind of go to the side or you can kind of slouch down, but if all your muscles relax that's when you can fall, to the floor. That's why [121] they thought I was passing out, because I had fallen to the floor. And most people get the deep sleep at one time and the cataplexy at a different time, so they fall to the floor and they're aware of what's going on around them but they usually can't talk to anybody during this time but they can still hear people. What we found out was that my deep sleep and my narcolepsy was happening at the exact same time, so that's why mine was so hard to diagnose.

Q. You mean your deep sleep and your cataplexy?

A. Yes, my deep sleep and my cataplexy were happening at the exact same time, so that's why it's hard to diagnose. You can have deep sleep—you can go into a deep sleep with your eyes open or with your

eyes shut. If I go into a deep sleep with my eyes shut and it was just relaxing some muscles, you know, then it just looked like I was passing out. If I went into a deep sleep and I was relaxing all muscles, you know, and my eyes are shut, you know, I was—I'd pass—I'd look like I was passing out on the floor but nobody could wake me up, so sometimes they thought was unconscious.

Q. Let me stop you there and just ask a question. When you said no one could wake you up, was this family members, because you never passed out at the school,

* * *

[124] Q. Okay. Were you still having any episodes or any—suffering from any of the effects of the narcolepsy in December 2004?

A. Yes, I'd just been diagnosed at that time and they were just starting to put me on the medication.

Q. What about in January of '05?

A. Yes. What happened is once I got put on the medicine is that I would gradually be increasing the medicine and then I would gradually be having less and less of the episodes.

Q. So you were still having episodes but less often?

A. Uh-huh.

Q. What about in February of '05?

A. I really don't remember when the last one was, but I do know that when I went to that meeting on February 13th I was not having any at that point and had not been having any for a while.

Q. Did you have any after that?

A. No. I have not had any at all ever since then.

Q. So you've been symptom free since at least February 13th of '05?

A. Yeah, actually before that, I mean, actually—I mean, really I could have gone back to work—okay.

Yeah I guess that answers that question. That was before February 13th that I was symptom free.

* * *

[129] the other medicines, so he wasn't sure on that. So I said we might need to add another month onto that, so it would be two to three months. It could be two months or it could be two to three months, and that was in December.

Q. That's your December 16th e-mail that you're referring to?

A. Yes.

Q. Okay. And you previously testified that December was when you had started the first of your new medication, right?

A. Yes.

Q. But you were still having episodes, right?

A. Yes.

Q. In fact, you passed out the week after Christmas, right?

A. Yes. It takes a little while for the medicine to work. You don't stop getting episodes immediately, your episodes start getting fewer and fewer—

Q. Okay.

A. —as your medicine is gradually increased.

Q. That's fine. So then if we get back to January 27th, again this is the first time—and you've probably been on your medication now at least a month—the first time that you had specific dates, February 14th and [130] February 28th, right?

A. Right.

Q. Okay. And do you remember you were being informed that they were going to be hiring a substitute, sometime around January 10th in an e-mail, named Elizabeth Gavrun?

A. Yes, they did tell me they were going to be hiring a substitute.

Q. Okay. And at that time you still hadn't given them a specific date when you would be returning, right?

A. I had told her in December that I would be returning in two to three months.

Q. Right, while you were still having episodes?

A. As I said previously, the episodes would become fewer and fewer as you gradually increase the medicine.

Q. So on January 10th of '05 when you were notified that they were going to be hiring Ms. Gavrun did you indicate to them that I should be able to be back next month in February?

A. We weren't able to make that prediction at that time. As I said earlier, in December I told her it would be two to three months. On January 27th I was far enough into my regimen of making the medication adjustments that the doctor was able to make a prediction that it would be sometime between February 14th and [131] February 28th.

Q. But as of January 10th you weren't far enough into your medications to make that prediction, right?

A. Not for him to make an accurate prediction.

Q. Okay. And in fact you sent an e-mail on January 12th regarding Ms. Gavrun being hired, and you stated in that e-mail I'm glad to hear that you found someone to be my long-term sub until I can come back?

A. Yes. Usually a person is considered a long-term sub if they're subbing for one week or more.

Q. Okay. So is that what you meant by the word long-term sub is one week or more?

A. Yes, it is, yes.

Q. But that didn't—you weren't referring to an extension on your return time, right?

A. No

Q. Meaning at this point you had no reason to believe that you still would not be back by February?

A. No. She had told me—I told her in December it would be two to three months and I still believed that, and then when I—and then later on in January I was able to give her an exact time line within a two-week span of between this date and this date that I would be returning. A long-term sub anywhere I've been has always been considered one week or more.

[132] Q. Were you still passing out as of January 12th?

A. As I stated earlier, I don't remember when the last day was that I—oh, I don't remember when the last date was that I had an episode. As I stated, we now at that point in my—at that point in my medical history we knew that I was not passing out. You might see in some of the e-mails me saying passing out because Stacey and I had gotten used to saying the word passing out, and she—I had explained it to her what it really was and she and I both knew that it wasn't passing out, so we just kept using those terms because we didn't really know what else to call it, but we knew that it wasn't passing out.

Q. Okay. So when you referred to she could also call but if I've passed out I won't hear the phone?

A. Yeah,

Q. You meant if you fell asleep?

A. Yeah, it could be fallen asleep or it could be fallen asleep with narcolepsy combined, and she knew that because I had already explained it to her. And we just didn't know what else to call it because that's what we've been calling it all along.

Q. Now, isn't it correct that on January—sometime around January 20th you went to a new dosage of your medication because you were having flu-like symptoms?

* * *

[136] to come back during this school year? So that's why I was saying generically this school year and not talking a time line of exactly what time.

Q. So you still hadn't given them a specific date?

A. In December I had given them the time of two to three months, and then when was the time—I think we've covered that already. What was the date that—there was another date that I gave them, the other—

Q. The February 14th to 28th day?

A. Yeah.

Q. That was January 27th. We haven't got to that e-mail yet.

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed 10/23/08]

Case No. 07-14124

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

v.

HOSANNA-TABOR EVANGELICAL
LUTHERAN CHURCH AND SCHOOL,
Defendant,

and

CHERYL PERICH,
Plaintiff/Intervenor,

v.

HOSANNA-TABOR EVANGELICAL
LUTHERAN CHURCH AND SCHOOL,
Defendant.

Honorable Patrick J. Duggan

JUDGMENT

At a session of said Court, held in the
U.S. District Courthouse, City of Detroit,
County of Wayne, State of Michigan
on October 23, 2008.

PRESENT: THE HONORABLE PATRICK J.
DUGGAN U.S. DISTRICT COURT JUDGE

This matter is before the Court on motions for summary judgment filed by all parties. For the reasons set forth in an Opinion and Order issued this date,

IT IS ORDERED, ADJUDGED, AND DECREED that Hosanna-Tabor's motions for summary judgment are GRANTED and the Equal Employment Opportunity Commission's and Cheryl Perich's complaints are DISMISSED WITH PREJUDICE.

/s/ PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Copies to:

Omar Weaver, Esq.
James E. Roach, Esq.
Deano C. Ware, Esq.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed Mar. 09, 2010]

Nos. 09-1134; 09-1135

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff - Appellant (09-1134),

CHERYL PERICH,
Intervenor Plaintiff - Appellant (09-1135),

v.

HOSANNA-TABOR EVANGELICAL LUTHERAN
CHURCH AND SCHOOL,
Defendant - Appellee.

Before: GUY, CLAY, and WHITE, *Circuit Judges*.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the order of the district court entering summary judgment on behalf of Defendant is VACATED and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
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Filed: March 09, 2010

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Re: Case No. 09-1134/09-1135, *EEOC v. Hosanna-Tabor Evangelical Lut* Originating Case No. 07-14124

Dear Counsel,

The court today announced its decision in the above-styled case.

Enclosed is a copy of the court's opinion together with the judgment which has been entered in

conformity with Rule 36, Federal Rules of Appellate Procedure.

Yours very truly,

Leonard Green, Clerk

Linda K. Martin
Deputy Clerk

Enclosures

Mandate to issue

PETITIONER'S BRIEF

AND BRIEFS

FILED
JUN 13 2011
OFFICE OF THE CLERK

No. 10-553

In the Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL., RESPONDENTS

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QUESTION PRESENTED

The federal courts of appeals have long recognized the "ministerial exception," a First Amendment doctrine that bars most employment-related lawsuits brought against religious organizations by employees performing religious functions. The circuits are in complete agreement about the core applications of this doctrine to pastors, priests, and rabbis. But they are evenly divided over the boundaries of the ministerial exception when applied to other employees. The question presented is:

Whether the ministerial exception applies to a teacher at a religious elementary school who teaches the full secular curriculum, but also teaches daily religion classes, is a commissioned minister, and regularly leads students in prayer and worship.

PARTIES TO THE PROCEEDINGS

Petitioner Hosanna-Tabor Evangelical Lutheran Church and School was the defendant-appellee below. Respondent Equal Employment Opportunity Commission was the plaintiff-appellant below, and respondent Cheryl Perich was the intervenor-plaintiff-appellant below.

Petitioner Hosanna-Tabor Evangelical Lutheran Church and School has no parent corporation and issues no stock.

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OPINIONS BELOW

The Sixth Circuit's opinion (Pet. App. 1a-30a) is reported at 597 F.3d 769 (6th Cir. 2010). The District Court's opinion (Pet. App. 31a-53a) is reported at 582 F. Supp. 2d 881 (E.D. Mich. 2008). The District Court's opinion denying the motion for reconsideration (Pet. App. 54a-61a) is unpublished.

JURISDICTION

The judgment of the Sixth Circuit was entered on March 9, 2010. J.A. 279. That court denied rehearing on June 24, 2010. Pet. App. 62a-63a. On September 2, 2010, Justice Thomas extended the time within which to file a petition for certiorari to and including October 22, 2010, and the petition was filed on that date. The petition was granted on March 28, 2011. This Court has jurisdiction under 28 U.S.C. §1254(1) (2006).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The relevant statutory provisions are reproduced in Pet. App. 64a-66a.

INTRODUCTION

The courts of appeals agree that there is a ministerial exception to employment-law litigation. They agree that it extends beyond pastors, priests, and rabbis, but not as far as janitors or secretaries. The question is where to draw the line.

The Sixth Circuit gave a mechanistic answer to the question, adding up minutes of the day in columns it labeled "secular" and "religious," and comparing the totals. But counting minutes does not measure the importance of an individual's religious functions; it does not account for the concept of an ecclesiastical office; and it does not serve the purposes of the ministerial exception.

The private plaintiff here is within the ministerial exception because she performed important religious functions. She taught religion classes, led worship, and led prayer. She was required to integrate faith into secular subjects. She was the Church's primary instrument for communicating the faith to her students. She held ecclesiastical office as a commissioned minister in the Lutheran Church.

She violated church teaching, was found unfit for ministry by a vote of the Church congregation, and was removed from ecclesiastical office. Instead of challenging that ruling within the church, she filed a claim in civil court seeking reinstatement as a commissioned minister and "called" teacher. Such a claim would run roughshod over the Lutheran system for resolving internal religious disputes. It would entangle the courts in the religious question of her fitness for ministry. And it would result in the government dictating to the Church who will teach its

religious message. That result cannot be squared with the First Amendment.

STATEMENT

1. Petitioner Hosanna-Tabor Evangelical Lutheran Church and School ("the Church") is a member congregation of The Lutheran Church—Missouri Synod ("the Synod"). In 2004, just before this dispute arose, the Church had 429 members on the rolls, 151 of whom were sufficiently active that they attended services at least twice a month. J.A. 177.

As part of its ministry, the Church operates a K-8 school. Pet. App. 3a, 33a. The school is not separately incorporated, but is simply one of the ministries of the Church. It is governed by the voting members of the Church congregation, together with two boards composed of volunteers. J.A. 59-60. In 2005, the school had eighty-four students and seven teachers, including the principal, who also taught half-time. J.A. 119, 120-21, 177. The school offered a "Christ-centered education" based on biblical principles. Pet. App. 4a-5a, 35a.[1]

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[1] The Church and school operated at a financial deficit in 2004-05. See J.A. 233, 235, 242, 245. At the end of the 2008-09 school year, the Church closed the school and released all the teachers. The case is not moot, because the school never had a separate legal existence. The Church was the employer, and the Church is the defendant.

Beginning in academic year 2009-10, the Church agreed to jointly operate a school with another Lutheran church nearby. See Concordia Lutheran School, http://www.concordials.org/. The new school is a joint venture of the two churches and is not separately incorporated.

2. Missouri Synod schools may have two types of teachers: "called" teachers and "lay" teachers. Pet. App. 3a, 33a. Called teachers are chosen by a vote of the Church congregation. *Ibid.* They are called for open-ended terms, and their call can be rescinded only for cause and only by a supermajority vote of the congregation. Pet. App. 3a, 33a, 38a; J.A. 65, 212. Respondent Cheryl Perich was a called teacher in Hosanna-Tabor's school. Pet. App. 3a-4a, 34a.

Lay teachers are selected by the school board, without a vote of the congregation, and only for one-year terms. Pet. App. 3a, 33a; J.A. 120. Lay teachers are employed only if the Church cannot fill all positions with called teachers. J.A. 63, 270-71. In 2002-03, the Church employed one lay teacher who was not Lutheran. J.A. 225. All lay teachers are required to be Christian and to teach and act in accordance with Lutheran doctrine. J.A. 46.

3. Called teachers occupy an important position within the Synod. Since its founding in the mid-1800s, the Synod has held that the work of called teachers is sacred because, by teaching the faith in word and deed, they perform part of the pastoral functions of the church.[2] Because called teachers perform pastoral functions, they must first receive a

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[2] Commission on Theology and Church Relations, *The Ministry: Offices, Procedures and Nomenclature* 6, 11-14, 22-27, 30 (1981) (*The Ministry*), available at http://www.lcms.org/Document.fdoc?src=lcm&id=423. The Synod's Commission on Theology and Church Relations publishes statements on theological issues, which are available on the Synod's website and help explain the theological offices and terms at issue in this case. For further explanation of these offices and terms, see Brief of Lutheran Church—Missouri Synod as Amicus Curiae (LCMS Brief).

"call." The call is a rich theological concept within Lutheranism, dating to the Augsburg Confession of 1530, which states that "no one should publicly teach in the Church or administer the Sacraments unless he be regularly called."[3]

To be eligible for a call, teacher candidates must satisfy religious, character, and educational standards.[4] The educational standards may be certified on graduation with appropriate courses from a Lutheran college or university. LCMS Br., *supra* n.2; J.A. 267. Candidates without such certification must complete eight college-level theology courses known as the "colloquy." Pet. App. 3a, 33a; J.A. 267. These courses are also taught by the Synod's system of colleges and universities; Perich took hers at Concordia College in Ann Arbor. J.A. 41, 51. Currently, the required courses must include "biblical interpretation (Old and New Testament), church history, the Lutheran Confessions, doctrine, the beliefs of other religious bodies, and the ministry of the Lutheran teacher."[5] The courses are termed "colloquy" because after completing them, the candidate must be orally examined by a committee of faculty in a final interview, or colloquy.[6] Once the candidate has passed the colloquy and satisfied the other requirements, she is

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[3] *The Augsburg Confession* Art. XIV (1530), available at http://www.lcms.org/page.aspx?pid=414.

[4] *Colloquy for Ministers of Religion—Commissioned in the Lutheran Church—Missouri Synod* 5-8 (2011), available at http://classic.lcms.org/graphics/assets/media/BHECUS/Colloquy%20Policy%20Manual%203_11.pdf.

[5] *Colloquy for Ministers*, *supra* n.4, at 8.

[6] *Id.* at 7.

listed on the Synod's roster of persons eligible for a call. Pet. App. 3a, 33a, 51a; J.A. 41.

To receive a call, a candidate must be selected by a local church congregation. Pet. App. 3a, 33a. At Hosanna-Tabor, the school board typically presents a choice of candidates to the congregation, J.A. 62, 91, and after prayerfully considering the candidates, the congregation extends a call via congregational vote, J.A. 42. Once the call has been accepted, the candidate is installed in office via the public rite of "commissioning," and is recognized as a "Minister of Religion, Commissioned"—also known as a "commissioned minister." J.A. 42, 48; Pet. App. 3a, 33a.

4. Hosanna-Tabor first employed Perich as a lay teacher in 1999. Pet. App. 3a, 34a; J.A. 46. She received her call in March 2000, J.A. 42-43, and thereafter, served as one of the Church's commissioned ministers and called teachers. Pet. App. 3a-4a, 34a. As a commissioned minister, Perich was subject to the same employment and dispute resolution rules as the pastor of the congregation. Pet. App. 51a; J.A. 55. Because she was working "in the exercise of the ministry," she was authorized to claim special tax treatment for a housing allowance for ministers, J.A. 217-20, which she did. Pet. App. 4a, 34a.

The District Court found that the Church's classification of Perich as commissioned minister was a sincere religious practice, Pet. App. 51a, and that "Hosanna-Tabor treated Perich like a minister and held her out to the world as such long before this litigation began." Pet. App. 52a. The Sixth Circuit did not disagree.

During the 2003-04 school year, Perich taught fourth grade. Pet. App. 4a. Perich taught religion classes four days a week, led students in prayer three times a day, led students in daily devotional exercises, and attended a school-wide chapel service with her students every week. Pet. App. 4a, 34a. In rotation with the other teachers, she led that chapel service, selecting the liturgy, Scripture readings, and hymns to be sung, and delivering a short message of her own composition based on the Scripture readings. J.A. 224.

In addition to these duties, Perich taught an academic fourth-grade curriculum. Pet. App. 4a. In accordance with Lutheran teaching, she was expected to "integrate faith into all subjects." Pet. App. 5a, 35a. She did so, for example, by teaching a student about the Lutheran doctrine of justification by faith in connection with an essay in English, J.A. 53, answering questions about God in social studies, J.A. 227, commenting on God as Creator in science, *ibid.*, and discussing theological questions during a parent-teacher conference, J.A. 53.

As a called teacher, Perich was pledged "[t]o exemplify the Christian faith and life" and "to live in Christian unity with the members of the congregation and co-workers." J.A. 48.

5. Like many Christian denominations, the Synod has long taught that Christians should resolve religious disputes within the church rather than sue each other in the civil courts. This teaching is based

on 1 *Corinthians* 6:1-11, and is further developed in Lutheran interpretations of that Scripture.[7]

The teaching is embodied in an elaborate internal process for resolving disputes arising within the Synod. Pet. App. 77a-104a. The process provides for informal and formal reconciliation, reconcilers and facilitators, dispute resolution panels, appeals panels, and review panels. Pet. App. 84a-98a. It emphasizes that "[f]itness for ministry and other theological matters must be determined within the church." Pet. App. 77a.

6. In June 2004, Perich became ill with what was eventually diagnosed as narcolepsy. Pet. App. 5a-6a, 35a. Symptoms included sudden and deep sleeps from which she could not be awakened. J.A. 271. She received various treatments, and offered several estimated dates of return to work, but all passed without her being able to return. J.A. 126-27, 131, 132.

Because of the school's small staff and limited budget, Perich's absence created immediate difficulties. For a full semester, the school attempted to preserve a job for Perich by combining three grades into a single classroom. J.A. 161; Pet. App. 35a. But parents complained about that arrangement. Pet. App. 7a n.1. Finally, in January 2005, seven months after Perich fell ill, the school hired a replacement for the spring semester. Pet. App. 6a-7a & n.1, 35a-36a.

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[7] See Commission on Theology and Church Relations, *1 Corinthians 6:1-11: An Exegetical Study* (1991), available at http://www.lcms.org/Document.fdoc?src=lcm&id=415.

Perich continued to offer revised estimates for her possible return, Pet. App. 6a, 36a; J.A. 172, but the school's principal, Stacey Hoeft, explained that she could not breach the contract with the replacement teacher or impose a third new teacher on the fourth-grade class in a single year. Pet. App. 6a-7a, 36a; J.A. 173. Instead, she asked Perich to discuss with her doctor whether she would be able to return the following school year. J.A. 168.

On January 30, foreseeing no early end to Perich's inability to work, the congregation voted to ask Perich for a "peaceful release from her call." Pet. App. 7a, 36a. "Peaceful release" is a religious act by which a congregation and a called minister agree to release one another from the mutual obligations of the call. Peaceful releases are common, and they leave the called minister in good standing and eligible for a new call. J.A. 56, 89, 106.

Perich refused the request for a peaceful release. J.A. 199. Instead, on February 8, she obtained a note from her doctor that said, without explanation, that she would be "able to return to work/school on 2/22/05." J.A. 190; Pet. App. 7a, 37a. The school board and the school's principal reiterated that because of the replacement teacher's contract, there was no position for Perich to return to until at least the following school year. J.A. 146, 229; see also J.A. 158-59. They also expressed concern about the children's safety, given Perich's recent reports of severe symptoms and the risk that she could collapse into a deep sleep while supervising children. J.A. 173. Because the doctor's note contained no explanation, it did little to alleviate these concerns. J.A. 135-36. In fact, Perich continued to report sleep symptoms

and "a lot of problems" to her doctor throughout 2005. J.A. 250-57.

On February 13, the school board told Perich that "since there was no opening for her to return to, she could not return to work on February 22." Docket Entry 25-5; see also J.A. 146, 229. But on February 22, with no notice save a late-night email on February 21, Perich showed up at the school and refused to leave until Hoeft gave her a letter acknowledging that she had reported to work. Pet. App. 8a, 37a; J.A. 141-42, 146. Later that day, Perich told Hoeft that if she were not reinstated, she would sue the Church. Pet. App. 8a, 38a; J.A. 151-52. Hoeft immediately asked Perich if that were what she really meant, because a lawsuit would clearly violate the Church's conflict resolution policy applicable to called employees. J.A. 152. Perich repeated the threat. *Ibid.*

Scott Salo, who chaired the school board, J.A. 149, wrote Perich that night. He said that her actions had demonstrated an intent "not to return to work, but rather to create upheaval at our school." J.A. 229; Pet. App. 8a-9a, 38a. In the board's opinion, Perich had evinced "a total lack of concern for the ministry of Hosanna-Tabor Lutheran School." J.A. 229.

On March 19, after consulting with the Michigan District Office (a component of the Synod), Salo wrote Perich that the school board had decided to recommend that the congregation rescind Perich's call. J.A. 55. He said this decision was based on her "insubordination and disruptive behavior" on February 22, and because she had "damaged, beyond repair, the working relationship [she] had with the Administration and School Board by threatening to take legal action." *Ibid.*; Pet. App. 9a, 38a. At its next

meeting, after hearing from Church leaders and from Perich, the congregation voted 40 to 11 to rescind Perich's call. J.A. 211-12; Pet. App. 9a, 38a-39a.

7. The Equal Employment Opportunity Commission filed a complaint against the Church under the Americans with Disabilities Act, Pet. App. 64a-65a, alleging a single count of retaliation. Pet. App. 9a-10a, 32a; J.A. 16-17. Perich intervened, alleging the same retaliation claim and adding a retaliation claim under state law. Pet. App. 10a, 32a, 66a, 72a-73a. Neither complaint alleges disability discrimination.

Both complaints request an order reinstating Perich to her former position as a commissioned minister, together with back pay, compensatory damages, punitive damages, and injunctive relief ordering new "policies, practices, and programs" at the Church. Pet. App. 73a-74a; J.A. 17-18.

Perich and the Church filed cross-motions for summary judgment. The Church argued that the suit was barred by the ministerial exception, because called teachers have important religious functions and are commissioned ministers who play a crucial role in the pastoral and religious mission of the Church. Docket Entry 22. The Church also argued that its belief in internal resolution of religious disputes was a legitimate reason for rescinding Perich's call. *Ibid.* The Church argued that it had replaced Perich and asked for her peaceful release before she complained of discrimination, that she was not able to perform the essential functions of the job at any relevant time, and that she had come to school on February 22 for the purpose of provoking something that could be called retaliation and thus creating a claim. Docket Entry 36.

Perich and the EEOC argued that rescinding her call was an act of retaliation, Docket Entries 24, 35, and that the ministerial exception did not apply because the majority of her duties consisted of teaching secular subjects. Docket Entries 34, 35.

The District Court granted the Church's motion for summary judgment. Pet. App. 53a. The court emphasized that the Church called Perich as a commissioned minister and held her out to the world as such. Pet. App. 51a-52a. The court refused to second-guess the Church's view of the religious significance of called teachers, noting that "separation of church and state in the United States has made federal courts inept when it comes to religious issues." Pet. App. 52a. It further held that it could not adjudicate Perich's claim without "exploration of religious doctrine in violation of the First Amendment." Pet. App. 50a.

The Sixth Circuit disagreed.[8] It reasoned that an employee falls within the ministerial exception only if the employee's "primary" duties are religious. Pet. App. 17a. The court applied this test by counting the number of minutes Perich spent on various tasks. Pet. App. 4a, 19a-20a. The court concluded that Perich was not subject to the ministerial exception because she spent the "majority of her day teaching secular subjects using secular textbooks." Pet. App. 22a. It also emphasized that lay teachers could

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[8] Although the case was presented on cross-motions for summary judgment, the Sixth Circuit held, for reasons rooted in Sixth Circuit doctrine, that the District Court had appropriately found facts. It reviewed these facts under the clearly erroneous standard. Pet. App. 10a-12a. Neither side has contested this determination, and it is not at issue here.

perform the same tasks as called teachers. Pet. App. 23a. It remanded "with instructions that the district court make a finding on the merits of Perich's retaliation claim," Pet. App. 25a—thus implicitly granting partial summary judgment to Perich on the ministerial exception defense.

Judge White, concurring, found the precedents "more evenly split" than the majority, Pet. App. 26a, but ultimately joined the panel's judgment because lay teachers performed the same tasks as called teachers. Pet. App. 29a.

SUMMARY OF ARGUMENT

I. This Court has long held that government cannot override the decisions of churches concerning the appointment of clergy. From this principle, the courts of appeals have unanimously developed the ministerial exception, which prevents ministers from suing their churches over most employment disputes.

The question presented is whether Perich's religious functions and her claim fall within the boundaries of the ministerial exception. Those boundaries must be drawn in light of the ministerial exception's constitutional foundations and purposes. The ministerial exception is independently rooted in the Free Exercise Clause, the Establishment Clause, and freedom of religious association.

The Free Exercise Clause protects the right of churches to select and control the employees who perform important religious functions. These employees speak for the church and are essential to its religious mission.

The Establishment Clause prevents government from appointing ministers. And it therefore prevents courts from reinstating ministers.

The Establishment Clause also prevents courts from deciding the religious questions that are inevitably involved in employment disputes over ministers. Employment discrimination suits turn on whether the employer acted for legitimate or prohibited reasons. When an employee performs important religious functions, the proffered legitimate reasons are nearly always religious, and courts cannot evaluate those reasons without deciding religious questions.

Freedom of association protects the right of religious associations to control their membership, their leadership, and those authorized to speak for the association, to the end that these associations can control their religious message.

These sources of law are independent grounds of the ministerial exception, and together, they define it. The ministerial exception is limited to employees who perform functions important to the employer's religious mission. And it is limited to cases that would end in reinstatement or its financial equivalent in back pay and front pay, *or* that would require the court to decide religious questions.

II. Perich's claim satisfies both requirements. She was important to the religious mission of the Church because she taught religion classes, led worship, and led prayer. She was expected to, and did, integrate faith into the secular curriculum. She was commissioned as an ecclesiastical officer pursuant to longstanding theological teachings. And she was the

Church's primary means of communicating the faith to her students.

She seeks reinstatement to her ecclesiastical office and other intrusive relief. She was dismissed for violating church rules, and the courts cannot decide her claim without resolving the religious disputes arising from her challenge to those rules. Allowing her claim to go forward would leave the Church unable to control who teaches the faith to the next generation.

ARGUMENT

I. The Constitution limits government interference in the selection of ministers and the resolution of religious questions.

A minister cannot sue to force a church to accept or retain him as a minister. This Court and the lower courts have enforced this principle with striking unanimity, and neither respondent has questioned it at any stage of this litigation. The disputed boundaries of the principle must be determined in light of the underlying bases of the rule: the Free Exercise Clause, the Establishment Clause, and freedom of association.

A. This Court and the lower courts have unanimously barred most lawsuits between ministers and their employers.

This Court has long recognized the right of religious organizations to control their internal affairs. *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 727-29 (1872). Courts cannot reverse religious tribunals on "questions of discipline, or of faith, or ecclesiastical rule, custom, or law." *Id.* at 727. They cannot "re-

solve a religious controversy." *Jones* v. *Wolf*, 443 U.S. 595, 604 (1979).

Most important, government cannot interfere with "[f]reedom to select the clergy." *Kedroff* v. *Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952). "[I]t is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them." *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 711 (1976) (quoting *Gonzalez* v. *Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929)).

Consequently, the government cannot install a chaplain whom the church has found unqualified. *Gonzalez*, 280 U.S. at 17-18. It cannot transfer religious authority from one bishop to another. *Kedroff*, 344 U.S. at 119. And it cannot reinstate a bishop who has been removed by higher church authorities. *Serbian*, 426 U.S. at 708, 720. The First Amendment bars all such government interference—whether perpetrated by the legislature, *Kedroff*, or sought from a court, *Serbian*, *Gonzalez*, and *Kreshik* v. *Saint Nicholas Cathedral*, 363 U.S. 190 (1960).

Applying these principles, the lower courts have unanimously agreed that courts may not hear discrimination claims by employees who carry out important religious functions. They have typically called this rule the "ministerial exception." Every court to consider the question has recognized the ministerial exception—including ten state supreme courts[9] and all twelve federal circuits with jurisdic-

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[9] *El-Farra* v. *Sayyed*, 226 S.W.3d 792 (Ark. 2006); *Pardue* v. *Center City Consortium Schools*, 875 A.2d 669 (D.C. 2005); *Pierce* v. *Iowa-Missouri Conference*, 534 N.W.2d 425 (Iowa 1995); *Music* v. *United Methodist Church*, 864 S.W.2d 286 (Ky.

tion over such cases. And all eleven circuits to consider the issue since 1990 have affirmed or reaffirmed the ministerial exception in the wake of *Employment Division* v. *Smith*, 494 U.S. 872 (1990).[10]

The lower courts are nearly as unanimous that the ministerial exception is *constitutionally* required, not just a matter of statutory interpretation. Some circuits rely on the Free Exercise Clause alone;[11]

1993); *Archdiocese of Washington* v. *Moersen*, 925 A.2d 659, 661-63 (Md. 2007); *Williams* v. *Episcopal Diocese*, 766 N.E.2d 820 (Mass. 2002); *Miller* v. *Catholic Diocese*, 728 P.2d 794 (Mont. 1986); *McKelvey* v. *Pierce*, 800 A.2d 840, 859 (N.J. 2002); *Cha* v. *Korean Presbyterian Church*, 553 S.E.2d 511 (Va. 2001); *Coulee Catholic Schools* v. *Labor and Industry Review Commission*, 768 N.W.2d 868 (Wis. 2009). In other states, there are decisions from intermediate appellate courts.

[10] *Rweyemamu* v. *Cote*, 520 F.3d 198, 204-10 (2d Cir. 2008); *Petruska* v. *Gannon University*, 462 F.3d 294, 303-07 (3d Cir. 2006); *EEOC* v. *Roman Catholic Diocese*, 213 F.3d 795, 800-05 (4th Cir. 2000); *Combs* v. *Central Texas Annual Conference*, 173 F.3d 343, 347-50 (5th Cir. 1999); *Hollins* v. *Methodist Healthcare, Inc.*, 474 F.3d 223, 225-27 (6th Cir. 2007); *Schleicher* v. *Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008); *Scharon* v. *St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360, 362-63 (8th Cir. 1991); *Werft* v. *Desert Southwest Annual Conference*, 377 F.3d 1099, 1100-04 (9th Cir. 2004); *Bryce* v. *Episcopal Church*, 289 F.3d 648, 655-57 (10th Cir. 2002); *Gellington* v. *Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1301-04 (11th Cir. 2000); *EEOC* v. *Catholic University*, 83 F.3d 455, 460-63 (D.C. Cir. 1996). The most recent decision in the First Circuit is *Natal* v. *Christian and Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989).

[11] *Natal*, 878 F.2d at 1578; *Petruska*, 462 F.3d at 306-07; *Combs*, 173 F.3d at 345.

most rely on both Religion Clauses.[12] A few judges have read the ministerial exception into silent federal statutes in order to avoid constitutional questions.[13]

Without constitutional protection, federal, state, and local employment laws would prohibit many common religious practices—including the all-male clergy among Catholics and Orthodox Jews, rules about ethnicity and descent in some branches of Judaism, Islam, Hinduism, Zoroastrianism, and Native American religions, and in states that prohibit marital-status discrimination, celibacy rules. Although some anti-discrimination laws contain exemptions that allow religious organizations to hire on the basis of *religion*,[14] these exemptions do not protect hiring on the basis of any other protected category. And they do not prevent ministers willing to claim discrimination on the basis of other categories from demanding that courts second-guess the church's assessment of their religious qualifications. The constitutional ministerial exception is thus

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[12] *Rweyemamu*, 520 F.3d at 208-09; *Shaliehsabou* v. *Hebrew Home*, 363 F.3d 299, 306 n.7 (4th Cir. 2004); *Tomic* v. *Catholic Diocese*, 442 F.3d 1036, 1042 (7th Cir. 2006); *Scharon*, 929 F.2d at 363; *Werft*, 377 F.3d at 1100-01; *Bryce*, 289 F.3d at 655; *Gellington*, 203 F.3d at 1304; *Catholic University*, 83 F.3d at 460-67; see also *Hollins*, 474 F.3d at 225 ("the First Amendment's guarantees of religious freedom").

[13] *Schleicher*, 518 F.3d at 475; *Hankins* v. *Lyght*, 441 F.3d 96, 116-17 (2d Cir. 2006) (Sotomayor, J., dissenting).

[14] 42 U.S.C. §12113(d) (Supp. 2009) (Americans with Disabilities Act); 42 U.S.C. §2000e-1(a), §2000e-2(e)(2) (2006) (Title VII).

essential to the right of churches to choose their own ministers.

Finally, the lower courts agree that the ministerial exception applies not just to pastors of congregations, but to other employees who are important to the religious mission of the church. See, *e.g.*, *Coulee*, 768 N.W.2d at 890 (teacher); *Roman Catholic Diocese*, 213 F.3d at 804 (music director and teacher); *Catholic University*, 83 F.3d at 463-64 (canon law professor). What they disagree about is how far beyond pastors of congregations the ministerial exception extends.

The scope of the ministerial exception must be informed by the reasons for the ministerial exception. Those reasons lie in the exception's three constitutional bases: the Free Exercise Clause, the Establishment Clause, and freedom of religious association. Together, they establish that the ministerial exception applies to employees who perform important religious functions and to claims that would impose an unwanted minister on a church or entangle the government in religious questions.

B. The Free Exercise Clause protects the right of religious organizations to choose who will perform important religious functions.

1. In *Kedroff*, this Court grounded the church's right to select its own clergy principally in the Free Exercise Clause. "Legislation that regulates church administration, the operation of the churches, *the appointment of clergy* * * * prohibits the free exercise of religion." 344 U.S. at 107-08 (emphasis added). Thus, a law interfering with the church's selection of

a bishop "directly prohibits the free exercise of an ecclesiastical right, the Church's choice of its hierarchy." *Id.* at 119.

In *Serbian*, the Court held that requiring the church to reinstate a bishop would violate "the First Amendment"—thus invoking both the Free Exercise Clause and the Establishment Clause. 426 U.S. at 709-10, 712, 719. Relying on *Kedroff*'s free exercise analysis, the Court emphasized that churches have power "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 722 (quoting *Kedroff*, 344 U.S. at 116). This includes the right to decide who will serve as clergy: "[Q]uestions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern." *Id.* at 717. By attempting to reinstate the bishop, the state court had "unconstitutionally undertaken the resolution of quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals of this hierarchical church." *Id.* at 720.

In light of these cases, the courts of appeals have uniformly recognized that the ministerial exception is an essential part of the free exercise of religion. See *supra* nn.11-12. And they have recognized that the right extends beyond bishops, to pastors and to others who carry out the religious mission of the church. See p. 19, *supra*. If a religious organization is to shape its doctrine and manage its internal affairs, it must be able to control the employees who teach its message and carry out its mission.

As many courts have now said: "The relationship between an organized church and its ministers is its

lifeblood." Pet. App. 15a; *Petruska*, 462 F.3d at 306; *Gellington*, 203 F.3d at 1304; *Catholic University*, 83 F.3d at 461 (all quoting *McClure* v. *Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972)). Ministers play a critical role in the operation of churches and in the spiritual lives of religious Americans. "Ministers marry their children and bury their parents; they act as their spiritual counselors and serve as their moral advisors." *Petruska*, 462 F.3d at 306 n.9. Ministers lead worship and perform sacraments. They teach the tenets of faith to children and adults. Not just pastors of congregations, but also religion teachers, may teach the tenets of faith, lead worship, and give spiritual advice.

For many believers, their relationship with their minister, religious counselor, or religious teacher is one of deep trust and confidence. "Federal court entanglement in matters as fundamental as a religious institution's selection or dismissal of its spiritual leaders risks an unconstitutional 'trespass[] on the most spiritually intimate grounds of a religious community's existence." *Hankins*, 441 F.3d at 117 (Sotomayor, J., dissenting) (quoting *Roman Catholic Diocese*, 213 F.3d at 800).

The lower courts have uniformly agreed that the ministerial exception applies not just to pastors, but to other employees who perform important religious functions. Examples include a professor of canon law who was "entrusted with instructing students in the 'fundamental body of ecclesiastical laws' that governs the Church's sacramental life," *Catholic University*, 83 F.3d at 464; a music director and teacher who was "the primary human vessel through whom the church chose to spread its message in song," *Roman*

Catholic Diocese, 213 F.3d at 804; an Hispanic Communications Director who was "integral in shaping the message that the Church presented to the Hispanic community," *Alicea-Hernandez* v. *Catholic Bishop*, 320 F.3d 698, 704 (7th Cir. 2003); and, in some courts, elementary school teachers who were "an important instrument in a faith-based organization's efforts to pass on its faith to the next generation," *Coulee*, 768 N.W.2d at 890. Teachers in religious schools are responsible for "teaching and spreading the * * * faith and supervising and participating in religious ritual and worship." *Clapper* v. *Chesapeake Conference*, 1998 WL 904528, at *7 (4th Cir. Dec. 29, 1998) (unpublished). See also *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 501-04 (1979) (noting the "critical and unique role" of teachers in religious schools, *id.* at 501, and holding that mandatory collective bargaining and unfair labor practice charges on behalf of teachers would raise constitutional questions under both Religion Clauses).

The lower courts have formulated various tests, but they have largely agreed that the ministerial exception applies to employees who perform functions "important to the spiritual and pastoral mission of the church." Pet. App. 17a; *Young* v. *Northern Illinois Conference*, 21 F.3d 184, 186 (7th Cir. 1994); *Werft*, 377 F.3d at 1101 n.4; *Catholic University*, 83 F.3d at 461 (all quoting *Rayburn* v. *General Conference of Seventh-day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985)). The ministerial exception extends to all those the church selects "to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large." *Rayburn*, 772 F.2d at 1168. These are objectively important functions in any religion.

2. This Court's more recent free exercise cases are fully consistent with the ministerial exception. In *Smith*, 494 U.S. 872, plaintiffs claimed an individual constitutional right to use peyote. The Court rejected the claim, holding that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'" *Id.* at 879.

In reviewing what the Free Exercise Clause *does* protect, the Court reaffirmed the cases underlying the ministerial exception: "The government may not * * * lend its power to one or the other side in *controversies over religious authority* or dogma." *Id.* at 877 (emphasis added), citing *Serbian*, *Kedroff*, and *Presbyterian Church* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 445-52 (1969). An employee who performs important religious functions is empowered to speak for the church, and is thus in a position of religious authority. *Smith* reaffirms that government may not take sides in a dispute over who should occupy such a position.

All eleven circuits to address the question since *Smith* have agreed that the ministerial exception remains good law. See *supra* n.10. As several of these courts have explained, the ministerial exception presents issues "of a fundamentally different character" from those in *Smith*. *Catholic University*, 83 F.3d at 462; accord, *Roman Catholic Diocese*, 213 F.3d at 800 n.*; *Schleicher*, 518 F.3d at 475; *Gellington*, 203 F.3d at 1303; *Combs*, 173 F.3d at 349. In *Smith*, the Court believed that imposing strict scrutiny any time a law substantially burdened any religious individual "would open the prospect of

constitutionally required religious exemptions from civic obligations of almost every conceivable kind"—thus empowering every individual, "by virtue of his beliefs, 'to become a law unto himself.'" *Smith*, 494 U.S. at 888, 885 (quoting *Reynolds* v. *United States*, 98 U.S. 145, 167 (1878)). To avoid that outcome, judges would have to "weigh the social importance of all laws against the centrality of all religious beliefs." *Id.* at 890.

The ministerial exception "does not present the dangers warned of in *Smith*." *Catholic University*, 83 F.3d at 462. It is limited to the right of churches to manage their own internal affairs, and most especially, to select their key personnel. This right is entirely internal to each religious organization. It is narrowly focused; there is no claim to a prima facie right to regulatory exemption whenever any individual acts on a religious motivation. The ministerial exception does not make every individual conscience "a law unto itself." *Smith*, 494 U.S. at 890.

Nor does it require the balancing condemned in *Smith*. The ministerial exception is a categorical rule; if a claim falls within it, the claim must be dismissed. There is no compelling interest test and no case-by-case balancing. See *Bollard* v. *California Province*, 196 F.3d 940, 946 (9th Cir. 1999); *Williams*, 766 N.E.2d at 825. Indeed, under the dominant understanding of the ministerial exception in the courts of appeals, the court need not even identify the church's religious beliefs, let alone balance them. See *Petruska*, 462 F.3d at 304 n.7 (ministerial exception "protects the act of a decision rather than a motivation behind it") (quoting *Rayburn*, 772 F.2d at 1169); accord, *Starkman* v. *Evans*, 198 F.3d 173, 176

(5th Cir. 1999); *Young*, 21 F.3d at 186; *Scharon*, 929 F.2d at 363; *Catholic University*, 83 F.3d at 465.

Moreover, the origins of the ministerial exception are completely independent of the doctrine at issue in *Smith*. *Smith* rejected "the *Sherbert* test" of *Sherbert* v. *Verner*, 374 U.S. 398 (1963). *Smith*, 494 U.S. at 882-85. But the right of a church to select its own clergy never rested on *Sherbert*. *Serbian* cited no case in the *Sherbert* line. Freedom to choose ministers was expressly attributed to the Free Exercise Clause in 1952, a decade before *Sherbert*. *Kedroff*, 344 U.S. at 107, 116. *Kedroff* relied on cases reaching back to *Watson* v. *Jones* in 1872, and *Watson* relied on still earlier cases in the state courts. 80 U.S. at 730-32. Although *Watson* was a common law decision, it relied on "that full, entire, and practical freedom for all forms of religious belief and practice which lies at the foundation of our political principles," *id.* at 728, and *Kedroff* "converted the principle of *Watson* * * * into a constitutional rule." *Presbyterian Church*, 393 U.S. at 447.

So the roots of *Smith* go back to *Reynolds* in 1878; the roots of the ministerial exception go back to *Watson* in 1872. *Reynolds* and *Watson* were decided by six of the same justices, and no one in *Reynolds* either criticized or relied on *Watson*. The issues are different, and they have always been perceived as different.

In short, the ministerial exception is historically unrelated to the issues in *Smith* and addresses fundamentally different concerns. This is why *Smith* could expressly reaffirm the principle and the cases underlying the ministerial exception. The right of a church to select the personnel who perform impor-

tant religious functions is an essential part of free exercise.

C. The Establishment Clause limits the government's authority to appoint ministers or resolve religious questions.

The ministerial exception is also, and independently, grounded in the Establishment Clause. *Serbian* attributed the church's right to choose its own clergy to both Religion Clauses. And nine circuits have attributed the ministerial exception to both Clauses. See *supra* n.12; see also *Kedroff*, 344 U.S. at 110 (relying on, in addition to free exercise, "our rule of separation between church and state").

The Establishment Clause imposes two important limits on the power of government to interfere in religious organizations: government cannot appoint ministers; and government cannot entangle itself in religious questions.

1. Government appointment of ministers.

Perhaps the most fundamental problem with discrimination suits by ministers is that when successful, they end in reinstatement. In effect, a judge or jury appoints a minister. But government-appointed ministers were one of the quintessential features of the established church.

In the Church of England, the King was head of the church, and ministers were appointed under his authority.[15] In the colonies, Anglican ministers were

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[15] Supremacy Act, 1534, 26 Hen. 8, c.1 (Eng.); An Acte Restrayning the Payment of Annates, &c (Ecclesiastical Appointments Act), 1534, 25 Hen. 8, c.20, §3 (Eng.). These Acts are

generally appointed by the governor. 2 George MacLaren Brydon, *Virginia's Mother Church* 260 (1952). Early on in Virginia, parish vestries successfully claimed that power for themselves. *Id.* at 259-60; Thomas E. Buckley, *Church and State in Revolutionary Virginia* 9-10 (1977). But in 1760, Governor Fauquier began appointing ministers in the frequent cases in which the vestry failed to act within a statutory time limit. 2 Brydon at 324-25. Some of his appointments were unacceptable to the vestries; indeed, some were public drunks. But the vestries had no power to remove these ministers, and the church in Virginia had no ecclesiastical court. Prominent leaders of the colony tried unsuccessfully to remove these ministers by litigation in the civil courts. *Id.* at 324-35. Similar controversies accompanied gubernatorial appointment of ministers in Maryland. Sanford H. Cobb, *The Rise of Religious Liberty in America* 392 (1970 reprint) (1902).

In the established Congregationalist churches of Massachusetts, ministers were elected by the voters of the town or parish, which were units of local government. See Mass. Const. of 1780, part I, art. III, *reprinted in* Jacob C. Meyer, *Church and State in Massachusetts* 234-35 (1968 reissue) (1930). Local practice had varied, Meyer at 173, but it was eventually settled that the right to elect a minister resided in the parish, notwithstanding "the nonconcurrence of the church in the choice of the minister." *Baker* v. *Fales*, 16 Mass. 488, 513 (1820). See Meyer at 172-83; 2 William G. McLoughlin, *New England Dissent* 1189-95 (1971); 3 Anson Phelps

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reprinted in 3 Statutes of the Realm 492, 463 (photo. reprint 1993) (1817).

Stokes, *Church and State in the United States* 377-80 (1950) (all analyzing *Baker*).

Disagreements between the voters of the town and the members of the church were a source of great dissatisfaction, often prompting the losers to abandon their church en masse. Meyer at 177-78, 182; 3 Stokes at 380. The losing side in many of these conflicts had historically been the strongest supporters of the establishment. Now they switched sides, powerfully reinforcing the demand for disestablishment. These conflicts over the election of ministers soon led to dismantling the whole system by state constitutional amendment. Cobb at 514-15; Meyer at 211-20; 2 McLoughlin at 1195-97, 1207. In short, government appointment of ministers was one of the principal evils of the established church—an evil now prohibited by the Establishment Clause.

Absent the ministerial exception, employment discrimination claims by ministerial employees would result in government appointment of ministers over the objections of churches. "[T]he presumptively appropriate remedy in a Title VII action is reinstatement." *Rweyemamu*, 520 F.3d at 205. But by ordering reinstatement, judges and juries would exercise the power to appoint the person who speaks for the church—just as the Crown, the governor, or the voters did in the days of the established church. In *Serbian*, the Court capsulized what the state court had done wrong in precisely these terms: "the court purported in effect to reinstate [the plaintiff] as Diocesan Bishop." 426 U.S. at 708. Reinstating a minister would violate the Establishment Clause.

2. Government entanglement in religious questions.

The Establishment Clause also prohibits government from becoming entangled in religious questions. As this Court explained in *Serbian*, "religious controversies are not the proper subject of civil court inquiry." *Id.* at 713. Courts must accept the decision of the church on "matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *Ibid.* Consequently, courts may not decide who gets to perform important religious functions.

a. Employment disputes between a minister and a church involve inherently religious questions. At the core of most such disputes is a disagreement over the reasons for an adverse employment action. The plaintiff says the reasons were discriminatory; the employer says the reasons were legitimate and job-related; plaintiff claims that these reasons are a pretext. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). But when the employee was performing important religious functions for a church, the employer's proffered legitimate reasons are nearly always religious. See *Tomic*, 442 F.3d at 1040. Even reasons that sound superficially secular are often religious at their core. For example, decisions about budget are decisions about religious priorities.

Resolving the dispute over the proffered religious reasons would require the court "to resolve a theological dispute." *Ibid.* Accordingly, the lower courts have held that such claims are barred by the ministerial exception. As the Fifth Circuit explained: "[W]e cannot conceive how the federal judiciary could determine whether an employment decision concerning a minister was based on legitimate or illegitimate

grounds without inserting ourselves into a realm where the Constitution forbids us to tread * * * ." *Combs*, 173 F.3d at 350. See also *Catholic University*, 83 F.3d at 465-66 (court cannot resolve claims of pretext); *Rweyemamu*, 520 F.3d at 209 (same); *Schleicher*, 518 F.3d at 474-75 (same). Some cases hold that courts can decide claims of religious pretext when the employee is not a minister. Pet. App. 24a-25a. But we are aware of no case in which a court held that it could decide a *minister's* pretext claim.

In *Serbian*, this Court held that it could not resolve even the procedural religious questions presented by the bishop's claim to reinstatement. The Court held that it "need not, and under the First Amendment cannot, demonstrate the propriety or impropriety of each of [the bishop's] procedural claims." 426 U.S. at 719. Inquiring into the church's procedures would plunge the courts "into a religious thicket" and would require "resolution of quintessentially religious controversies." *Id.* at 719, 720.

In *Catholic Bishop*, this Court explained the inevitable entanglement that would result from NLRB supervision of the employment relationship between teachers and religious schools. Teachers would charge the schools with an unfair labor practice; the school would say that there were religious reasons for its conduct. Resolving such charges would "necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." 440 U.S. at 502. Such an inquiry "presents a significant risk that the First Amendment will be infringed." *Ibid.*

The Court has been especially vigilant about entanglement with teachers in religious schools. In *Catholic Bishop*, the issue was unionization of teachers in religious schools. *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), prohibited government subsidies for the salaries of teachers in religious schools. Both cases recognized a risk of excessive entanglement due to what *Catholic Bishop* summarized as "the critical and unique role of the teacher in fulfilling the mission of a church-operated school." 440 U.S. at 501 (citing *Lemon*, 403 U.S. at 617). Yet the subsidy program in *Lemon* excluded all religion classes, 403 U.S. at 608, 610, and the bargaining unit in *Catholic Bishop* was confined to lay teachers, 440 U.S. at 493 n.5. Perich's claim—involving a *commissioned minister* who teaches *religion*—presents an even greater risk of entanglement.

b. The Establishment Clause limits not just the judicial resolution of religious questions, but also the process of investigating them. As the Court explained in *Catholic Bishop*: "It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *Id.* at 502.

This "process of inquiry" is particularly entangling in religious employment discrimination cases. "Church personnel and records would inevitably become subject to subpoena, discovery, cross-examination, the full panoply of legal process designed to probe the mind of the church in the selection of its ministers." *Rayburn*, 772 F.2d at 1171; accord, *Catholic University*, 83 F.3d at 466-67. Even after entry of judgment, "questions of compliance

may result in continued court surveillance of the church's policies and decisions." *Rayburn*, 772 F.2d at 1171.

c. All these entangling consequences would flow even from claims by individual ministers against local churches. But that is not all. In hierarchical churches, and in many presbyterial and connectional churches, the local church is not free to select its own minister. Instead, ministers are employed, assigned, or referred by bishops or denominational conferences. If there were no ministerial exception, there could be class actions alleging that a church's criteria for ordination have disparate impact on protected minorities, or that some group is statistically underrepresented among the clergy, or otherwise seeking judicially imposed reform of the church in the guise of combating discrimination in the employment of ministers. If such a claim seems implausible, that is only because the ministerial exception has obviously barred it.

The ministerial exception is "designed to avoid these ends by avoiding these beginnings." *West Virginia* v. *Barnette*, 319 U.S. 624, 641 (1943). By barring claims that would require the government to resolve religious questions, the ministerial exception prevents entanglement. And by barring claims that would impose an unwanted minister on a church, the exception prevents government appointment of ministers. Both limitations are required by the Establishment Clause.

D. Freedom of religious association limits government interference in the selection of those who communicate a religious organization's message.

Finally, the freedom of religious association limits government interference in a religious organization's choice of ministers. "'[I]mplicit in the right to engage in activities protected by the First Amendment' is 'a corresponding right to associate with others in pursuit of a wide variety of political * * * [or] religious'" ends. *Boy Scouts* v. *Dale*, 530 U.S. 640, 647 (2000) (quoting *Roberts* v. *United States Jaycees*, 468 U.S. 609, 622 (1984)). Freedom of *religious* association has additional roots in the Religion Clauses, and is not necessarily identical to freedom of *expressive* association, which is rooted only in the Speech, Press, and Assembly Clauses. But the substantial body of law on expressive association is instructive.

1. Freedom of expressive association protects the right of an organization "to express those views, and only those views, that it intends to express." *Dale*, 530 U.S. at 648. The right to control the organization's message includes the right to control its membership, its leadership, and its choice of spokespersons.

In *Eu* v. *San Francisco County Democratic Central Committee*, 489 U.S. 214, 229 (1989), this Court held that freedom of expressive association "encompasses a political party's decisions about the identity of, and the process for electing, its leaders." At issue in *Eu* were the criteria for selecting members of the party's state central committee. *Id.* at 218. Even with respect to these low-visibility positions, the Court said that interference with the parties' choice of

leaders "may also color the parties' message and interfere with the parties' decisions as to the best means to promote that message." *Id.* at 231 n.21.

The Court has also protected membership decisions. "Insisting that an organization embrace unwelcome members * * * 'directly and immediately affects associational rights.'" *Christian Legal Society* v. *Martinez*, 130 S. Ct. 2971, 2985 (2010) (quoting *Dale*, 530 U.S. at 659). Forced inclusion violates freedom of association when it "affects in a significant way the group's ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 648. And the courts must "give deference to an association's view of what would impair its expression." *Id.* at 653.

The Court has repeatedly applied this rule to political parties, protecting their right to insist that only members of the party may vote or participate in party deliberations. "A political party has a First Amendment right to limit its membership as it wishes * * * ." *New York State Board of Elections* v. *Lopez Torres*, 552 U.S. 196, 202 (2008). "[T]he freedom to associate for the 'common advancement of political beliefs' necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party* v. *Wisconsin*, 450 U.S. 107, 122 (1981) (internal citation omitted). Accord, *California Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000).

2. The associational rights of religious organizations are stronger than those of political parties, because political parties are sometimes constrained by their quasi-governmental "role in the election process." *Lopez Torres*, 552 U.S. at 203. Moreover, the associational rights of religious organizations

stem not just from their members' expressive speech rights, but also from the Religion Clauses.

This Court has long recognized the "right to organize voluntary religious associations" and to provide for the governance of those associations. *Watson*, 80 U.S. at 728-29. Courts therefore "have no power to revise or question ordinary acts of church discipline, or of excision from membership." *Bouldin* v. *Alexander*, 82 U.S. (15 Wall.) 131, 139 (1872). The courts "cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off." *Id.* at 139-40. Thus, lower courts regularly dismiss tort suits in which individuals attempt to challenge church discipline or exclusion from membership. See, *e.g.*, *Westbrook* v. *Penley*, 231 S.W.3d 389 (Tex. 2007) (refusing to interfere with scriptural disciplinary process); *O'Connor* v. *Diocese of Honolulu*, 885 P.2d 361 (Haw. 1994) (refusing to interfere with excommunication); *Paul* v. *Watchtower Bible and Tract Society*, 819 F.2d 875 (9th Cir. 1987) (refusing to interfere with practice of shunning disciplined members).

What is true for members is even more true for leaders. Religious organizations must be "free to * * * select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions." *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. 327, 341 (1987) (Brennan, J., concurring) (internal quotation omitted). "Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a

means by which a religious community defines itself." *Id.* at 342.

Thus, the ministerial exception is also grounded in the freedom of religious associations to control their own messages. Government interference in the choice of the messenger inevitably affects the message. "A minister is not merely an employee of the church; she is the embodiment of its message." *Petruska*, 462 F.3d at 306. And courts have recognized that a teacher who teaches religion similarly speaks for the church and embodies its message when she addresses her students. *Coulee*, 768 N.W.2d at 890; *Clapper*, 1998 WL 904528, at *7.

This Court was careful to preserve freedom of religious association in *Smith*: "[I]t is easy to envision a case in which a challenge on *freedom of association grounds* would * * * be reinforced by Free Exercise Clause concerns." 494 U.S. at 882 (emphasis added) (citing *Jaycees*, 468 U.S. at 622). The scope and meaning of "hybrid rights" has been debated, but this example was no artificial combination of unrelated rights. The Court simply recognized that two closely related rights genuinely "reinforce" each other. The ministerial exception lies at the intersection of the Establishment Clause, the Free Exercise Clause, and freedom of association.

* * * * *

In sum, three important limits on governmental power are independent grounds for the ministerial exception. The ministerial exception extends not only to pastors, priests, and rabbis, but to other employees whose religious functions are important to a religious organization's mission, and to claims that

would impose an unwanted minister or entangle the courts in religious questions.

II. Perich's suit is barred by the ministerial exception.

Perich's lawsuit is barred by the ministerial exception because she performed important religious functions, and because her claim would impose an unwanted minister on the Church and entangle the government in religious questions.

A. Perich performed religious functions that were important to the mission of the Church.

Perich taught religion classes, led worship, and led prayer. She was expected to, and did, integrate faith with the secular curriculum. These are important religious functions, and their importance is independently confirmed by the ecclesiastical office that she held.

1. Perich taught religion classes, led worship, and led prayer.

Perich's first responsibility, as explained in the document extending her call, was "[t]o teach faithfully the Word of God, the Sacred Scriptures, in its truth and purity and as set forth in all the symbolical books of the Evangelical Lutheran Church." J.A. 48. To fulfill this responsibility, she taught religion to her students four days a week and took them to chapel on the fifth day; she led them in devotional exercises every day; she led them in prayer three times a day. Pet. App. 4a, 34a. In turn with the other teachers, she planned and led the worship services at the all-school chapel. For those services she chose liturgies, hymns, and Scripture readings and com-

posed and delivered a message based on the Scripture selections. J.A. 224.

These are objectively important religious functions, because they communicate the faith to the next generation. Indeed, Perich was the Church's *primary* means of teaching the faith to her students. She gave her students more religious instruction than all other employees and volunteers combined. She "preach[ed] [the Church's] values, t[aught] its message, and interpret[ed] its doctrines." *Rayburn*, 772 F.2d at 1168. She was thus important to the pastoral and spiritual mission of the Church.

Although the Sixth Circuit acknowledged that these duties were "devoted to religion," Pet. App. 20a, it dismissed their significance for three reasons. None withstands analysis.

a. First, the Sixth Circuit counted minutes on the clock. Pet. App. 4a, 19a-20a. It said that Perich's unambiguously religious activities consumed forty-five minutes every day, while "secular" activities consumed six and a quarter hours. *Ibid.* Thus, Perich's religious duties were not "primary." Pet. App. 20a.

This quantitative approach is a poor measure of importance. Other courts have rightly rejected it, emphasizing that an employee's role "obviously has both quantitative and qualitative elements." *Clapper*, 1998 WL 904528, at *7; see also *Coulee*, 768 N.W.2d at 882. Here, for example, if the Church hired a part-time teacher who performed only Perich's "religious" duties, the Sixth Circuit's rule would count that teacher as a minister, because 100% of her time would be devoted to "religious"

activities. But increase that teacher's hours, and tell her to also teach history and English, and suddenly she ceases to be important to the school's religious mission. Surely a teacher does not become *less* important to the school's religious mission when she assumes *more* responsibility.

The clock-driven approach also disregards far more probative evidence of Perich's importance to the Church. It disregards Perich's role as her students' primary source of religious instruction. It disregards her responsibility to integrate religion into "secular" subjects; it disregards her status as a commissioned minister; it disregards her mandatory religious education; and it disregards her religiously ordered relationship with the Church. By focusing on minutes, the Sixth Circuit missed the big picture of Perich's role in the religious mission of the Church.

b. Second, the Sixth Circuit repeatedly emphasized that Perich's duties could be performed by lay teachers who were "not required to be called or even Lutheran." Pet. App. 19a-20a, 21a, 29a; accord, 5a, 23a. The implicit premise is that teaching religion, leading worship, and leading prayer must not be religiously important if non-Lutherans can do these things. But this reasoning is mistaken in multiple ways.

For starters, the underlying premise is faulty. Teaching religion, leading worship, and leading prayer are religious duties regardless of who performs them. They do not become less religious merely because they are performed by lay teachers.

More important, the Sixth Circuit ignored the undisputed evidence that lay teachers are employed

only when no called teacher is available. J.A. 63; J.A. 271 (Perich Deposition). That the Church would employ a lay teacher rather than leave a class untaught says nothing about the importance of Perich's religious functions.

The Sixth Circuit also ignored the religious requirements that apply to lay teachers. Although lay teachers need not be Lutheran, they must be Christian, and they must teach Lutheran doctrine. Each lay teacher is contractually obligated "to set a Christian example," "to maintain Christian discipline in love," and to teach "according to the Word of God and the confessional standards of the Evangelical Lutheran Church as drawn from the Sacred Scriptures and found in the Book of Concord, particularly in Dr. Martin Luther's Small Catechism." J.A. 46 (Perich's contract as lay teacher). Cf. *Coulee*, 768 N.W.2d at 891 (although a teacher "was not required to be Catholic," the important fact is that "she was required to live, embody, and teach Catholicism in her role as a teacher consistent with the mission of the school").

c. Finally, the Sixth Circuit said that "nothing in the record indicates that the Lutheran church relied on Perich as the primary means to indoctrinate its faithful into its theology." Pet. App. 22a. The court offered no explanation or evidentiary support for this legal conclusion, which is both irrelevant and mistaken. It is irrelevant because Perich does not have to be the "primary" means of religious instruction; it is enough that she is an important means. A church may have more than one important means of instruction.

It is mistaken because, in fact, for the children in her class, Perich *was* the primary source of religious instruction. There was no pastor teaching at the school, and no specialized religion teacher. The religious instruction came from Perich.

Unlike the pastor in the adult worship service, Perich provided age-appropriate religious instruction and developed a close, personal relationship with her students. And unlike Sunday-school teachers, *The Ministry*, *supra* n.2, at 24-25, Perich was called. Thus, only Perich combined theological training with age-appropriate instruction and a personal relationship with students. And that instruction was substantial: forty-five minutes a day is nearly four hours a week, significantly more religious instruction and worship than the children could get from the Sunday school class for children and the Sunday worship service combined.

Both qualitatively and quantitatively, Perich was the Church's primary instrument for "indoctrinating" her students into the Lutheran faith. These religious duties were important to the mission of the Church and are sufficient in themselves to bring Perich within the ministerial exception.

2. Perich served as a Christian role model and integrated religion into secular subjects.

In addition to teaching religion, leading worship, and leading prayer, Perich was expected to serve as a Christian role model and to integrate faith into all subjects. Pet. App. 5a, 35a. These religious duties are a significant increment to her other religious duties.

The Church publicly held out its teachers as "fine Christian role models who integrate faith into all subjects." *Ibid.* The Synod emphasized the same duty: "Although [a teacher] may teach some 'secular' subject, the philosophy of Lutheran education includes the demand that the faith of the church be evident in all activities of the school." *The Ministry*, *supra* n.2, at 13.

Respondents have claimed that these duties are irrelevant because Perich rarely performed them. See Pet. App. 5a, 21a, 35a. But this argument confuses Perich's actual duties with her claim that she neglected these duties, and it ignores important evidence from Perich herself that she did, in fact, perform these duties.

a. Even assuming that Perich rarely integrated faith into secular subjects, that would merely show that she was not doing her job. The relevant question is what the Church relied on her to do, not whether she actually did it. If an employee could evade the ministerial exception by neglecting religious duties, or claiming to have neglected them, it would be more difficult to remove derelict ministers than good ones.

b. The record also demonstrates that Perich *did* perform these duties. Even her affidavit, which consists largely of an effort to minimize the religious functions of her job, admits that she integrated religion into secular subjects on multiple occasions. She "talk[ed] to a student about God during an English class"; she commented on God as Creator during Science; and she answered two students'

"questions about God during Social Studies." J.A. 227.[15]

Perich's affidavit is not the only evidence of how she integrated faith into secular subjects. The best evidence is her Personnel Information Form, filled out in June 2005 in hopes of finding employment as a called teacher with another Synod school. J.A. 51-54. There, Perich spoke in glowing terms of the importance of integrating faith into every subject:

> Educational Ministry is special not just because of the devotional time and the religion class, but because the teacher can bring God into every subject taught in the classroom. Students also, feel free to bring up topics that mention God or Religion during all times of the day. This is very important for them to be able to do as they are growing in their faith. * * * During English class, a year ago, I found out through reading a rough draft of an essay that [a student] understood that good people went to heaven. I showed her several scripture passages that tell that we get to heaven through faith in what Jesus has done for us. She wrote the passages in her notebook and

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[15] Her affidavit says that there were no other such instances "during my final academic year at the school." J.A. 228. At some point, a mistake slipped into the lower courts' summaries of this evidence. The multiple examples already summarized, plus another example discussed below, were reduced to two, and the limitation to Perich's "final academic year" was expanded to "her career." Pet. App. 5a, 21a, 35a. Undoubtedly the mistake was inadvertent, but it creates the misimpression that Perich's job was less religious than it was, that she was a worse employee than she was, or both. Perich's testimony shows otherwise. J.A. 53, 227-28.

> underlined them in her Bible, then changed her rough draft. She told other students about her new discovery at recess.

J.A. 53.

Perich also emphasized her opportunities to share the Gospel with parents:

> An Educational Ministry also opens the door to sharing the Gospel Message with parents. I still remember a very memorable parent teacher conference at Immanuel, Macomb. It was the last conf. of the evening. The Mom got a serious look on her face and said, "I have an important question for you." I got out a Bible and a small catechism. We stayed until midnight discussing theological questions.

Ibid.

In her affidavit, Perich tried to downplay these examples as isolated events. J.A. 227-28. But she was "a lifetime Lutheran," J.A. 267, who had worked in Lutheran schools in various capacities for eleven years. J.A. 51. She knew what congregations were looking for. She knew they would be attracted to a candidate who could "bring God into every subject taught in the classroom"; who could get a child so excited about justification by faith that she told her friends at recess; and who could deftly wield Luther's Small Catechism and talk theology with parents late into the night. This was Perich's judgment when she had every incentive to make herself attractive to congregations and call committees. It tells us what she understood were the responsibilities of a called teacher.

Serving as a role model and integrating faith into all subjects were significant religious duties in addition to teaching religion classes, leading worship, and leading prayer. In combination, these duties were critically important to the religious mission of the Church.

3. Perich occupied ecclesiastical office as a commissioned minister.

Perich also occupied the ecclesiastical office of commissioned minister. The office is not necessary to establish that Perich is within the ministerial exception; that is independently established by her important religious job functions. In all but exceptional circumstances, discussed below and not remotely present here, ecclesiastical office is also independently sufficient to establish that an employee is within the ministerial exception. Perich's ecclesiastical office is powerful confirmation of the religious importance of her role.

a. The Lutheran Church has always taught that teachers occupy an important office within the Church. That teaching goes back to Martin Luther himself:

> I am speaking of those schoolteachers who instruct the children and the youth not only in the arts, but also train them in Christian doctrine and faithfully impress it upon them; * * * [A] pastor and a schoolteacher plant and cultivate young trees and useful shrubs in the garden. Oh, they have a precious office and task, and they are the church's richest jewels; they preserve the church.

Martin Luther, *On the Councils and the Church* (1539), in 41 *Luther's Works* 3, 132, 135 (Eric W. Gritsch ed., 1966).

The Synod has adhered to these teachings since its founding in the mid-1800s. As the Synod's first president explained in an 1852 treatise: "[T]he offices of Christian day school teachers, almoners, sextons, precentors at public worship, and others are all to be regarded as ecclesiastical and sacred, for they take over a part of the one ministry of the Word and support the pastoral office." C.F.W. Walther, *Church and Ministry (Kirche und Amt)* 290 (J.T. Mueller trans. 1987) (1852).

The Synod's understanding of called teachers is based on its theology of ecclesiastical office. There is the "pastoral office," also referred to as "the public ministry," which includes "all the functions of the ministry of Word and sacrament in the church." *The Ministry*, *supra* n.2, at 6. And there are "auxiliary offices," which "perform certain of the function(s) of the office of the public ministry." *Ibid.* "The most common auxiliary office today is the office of the teaching ministry," *ibid.*, which is occupied by called teachers. Thus, "a professional trained teacher who is called as a teacher by the church may be said to be performing a function of the office of the public ministry. The teaching of the faith to the children and youth of the flock is a major duty of the pastoral office." *Id.* at 12.

Because teachers perform pastoral functions, the Church relies on called teachers whenever possible. J.A. 63, 271. The theology of the call goes back to the Augsburg Confession of 1530, *supra* n.3, and involves important religious requirements that further dem-

onstrate the importance of Perich's ecclesiastical office.

First, Perich had to complete college-level theology courses and an oral examination by a faculty committee. See pp. 5-6, *supra*. Second, Perich had to be selected by a vote of the congregation. The Synod emphasizes that the call ultimately comes from God, J.A. 42-43; *The Ministry*, *supra* n.2, at 24, and that the congregation acts with His "guidance," J.A. 42, and is "led by the Spirit," J.A. 120. Third, Perich had to be installed in office via "commissioning," a "solemn and public act" by which she is "brought into a unique relationship with the church." *The Ministry*, *supra* n.2, at 24.

Perich testified that she worked six years to complete her colloquy courses so that she would be eligible for a call. J.A. 268. She also testified: "I was very excited that I completed it after those long years of working on it, and * * * the two pastors and the principal was very excited for me also." J.A. 270. A requirement of substantial religious training is additional evidence of the religious importance of the job. *Starkman*, 198 F.3d at 176.

b. The Sixth Circuit treated the difference between called teachers and lay teachers as an irrelevant "title." Pet. App. 22a. That view is utterly alien to the Church's religious understanding of the call. A church does not spend five centuries developing the theology of a meaningless title. And an employee does not work six years to acquire a meaningless title.

The record shows that called teachers and lay teachers have completely different relationships to

the Church. Perich was required to have much more religious training. She was chosen in a prayerful process by a vote of the congregation; she was called for an indefinite term; and she was subject to the same disciplinary rules as the Church pastor. Pp. 4-6, *supra*; Pet. App. 51a; J.A. 55. She could be dismissed only for cause and only by a supermajority vote of the congregation. Pet. App. 3a, 33a, 38a; J.A. 212. She was held out to the Church and Synod as a commissioned minister and claimed a housing allowance for ministers on her taxes. Pet. App. 3a-4a, 33a.

Lay teachers, by contrast, were selected by the school board and limited to one-year terms, so that the Church could refuse at will to renew them. Pet. App. 3a, 33a. They were not subject to the same requirements of training in Lutheran theology, and they were employed as one-year expedients.

Perich falls within the ministerial exception because she had important religious duties, and because she occupied an important ecclesiastical office within the Church. Her duties are independently sufficient, and on these facts, her ministerial status within the Church is also independently sufficient.

4. The Church is entitled to reasonable deference on these questions.

The Church's religious understanding of Perich's job functions and her ecclesiastical office, and of their importance to the Church's religious mission, is entitled to deference. In the analogous context of expressive associations, the Court has said that "we give deference to an association's assertions regarding the nature of its expression," and "we must also give deference to an association's view of what would

impair its expression." *Dale*, 530 U.S. at 653. In the case of internal church matters, deference should be even greater, because the courts cannot "resolve a religious controversy." *Jones* v. *Wolf*, 443 U.S. at 604; part I.C.2, *supra*.

This Court need not investigate and resolve the issues of Lutheran theology raised by Perich's attempt to deny the religious significance of her duties, her call, and her status as a commissioned minister. Neither should it resolve all those theological issues against the Church by simply ignoring them. Rather, it should defer to the religious authorities that both sides acknowledged before this dispute arose. Cf. *Serbian*, 426 U.S. at 710-11 (quoting *Watson*, 80 U.S. at 728-29).

At the same time, deference is not abdication. The Church claims no right to arbitrarily designate just anyone as a minister, even if there were no substance to the designation. In fact, Lutheran teaching condemns leaving persons in a called position when they are not actually doing important religious work. *The Ministry*, *supra* n.2, at 34-35. The Church asks only that secular courts not second-guess good-faith religious understandings of religious functions and positions.

In *Schleicher*, 518 F.3d at 478, the Seventh Circuit adopted a rebuttable presumption that personnel treated as ministers by their church are within the ministerial exception, absent proof that the title was a sham or that the job was entirely secular. That is a sensible approach. Perich should be presumed to be within the ministerial exception, and she has offered nothing that can overcome that presumption.

* * * * *

An employee who performs important religious functions is a minister for purposes of the ministerial exception. An employee who holds an ecclesiastical office should be presumed to perform important religious functions, absent evidence that the office is a sham or that the job is entirely secular. Everything else—the required theology courses, the religiously driven selection process, the belief that the process is divinely guided, the requirement of congregational votes, the ministerial housing allowance, the fact that Perich was subject to the same disciplinary rules as the pastor—is evidentiary. Facts such as these are not essential, but they help confirm that the Church viewed Perich's functions as religious and as important to the mission of the Church.

B. Perich's claim would impose an unwanted minister and entangle the government in religious questions.

Although the ministerial exception applies to employees who are important to the religious mission of the church, it does not apply to every claim in which such an employee might be involved. Rather, it is limited to disputes between employer and employee that could impose an unwanted minister on a church or would entangle the government in religious questions. Perich's claim threatens both.

1. If successful, Perich's claim would end in an order reinstating her to the ministry or awarding the monetary equivalent.

Each complaint in this case requests an order reinstating Perich to her former position as a com-

missioned minister, together with back pay, compensatory damages for emotional distress, punitive damages, and injunctive relief ordering new "policies, practices, and programs" at the Church. J.A. 17-18; Pet. App. 73a-74a. Perich's complaint also seeks attorneys' fees. Pet. App. 74a.

Reinstatement of an unwanted minister is a uniquely intrusive remedy. See *Serbian*, 426 U.S. at 708 ("the court purported in effect to reinstate [the plaintiff] as Diocesan Bishop"); *Rweyemamu*, 520 F.3d at 205. It violates the core of the Establishment Clause, creating a class of government-appointed clergy. Part I.C.1, *supra*. It also violates the right of religious organizations to select their own ministers under the Free Exercise Clause and to select their spokespersons under the freedom of religious association. Parts I.B and I.D, *supra*.

Awarding the monetary equivalent of reinstatement, in the form of back pay and front pay, does much the same. To give a discharged employee the monetary value of her former job requires the judge or jury first to determine that she is entitled to the job—that she should have been the minister. And that is precisely the decision they are constitutionally forbidden to make.

Substantial monetary liability would also have enormous deterrent effect on the right of churches to select their own ministers. A small church like Hosanna-Tabor, struggling to keep its school open at all, would have to be exceedingly cautious about rescinding a call, no matter what the minister had done. Respondents seek to compound this deterrent effect by seeking compensatory and punitive damages and attorneys' fees, in addition to reinstatement

and backpay. As this Court warned in *Amos*: "Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission." 483 U.S. at 336.

Because the complaints seek reinstatement to a ministerial position or its monetary equivalent, the claim in this case is at the heart of the ministerial exception.

2. Perich's claim would entangle the courts in religious questions.

Perich's claim would entangle the courts in religious questions, in two related ways. It would require the courts to overturn the Church's decision on a contested religious matter—Perich's fitness for ministry. And it would require the courts to decide religious questions in the course of resolving Perich's claim of pretext.

a. Perich's claim would require the courts to overturn the Church's determination of a religious question.

At the center of this suit is a dispute over Perich's fitness to serve as a called teacher and commissioned minister. The very act alleged as retaliation is a religious act—the rescission of her call. Like the issuance of the call, pp. 4-6, *supra*, the rescission of a call is a fundamentally religious act: It removes an individual from ecclesiastical office, and it severs the religious relationship between the calling church and the called employee.

Perich lost her call not because school officials fired her, but because the Church congregation voted to rescind her call. She could have challenged that decision through the Synod's dispute resolution

process, but she chose not to do so. The congregation is therefore the highest Church body to decide Perich's fitness to serve as a minister.

Perich's lawsuit directly challenges the congregation's decision. She argues that she is, in fact, fit to serve as a commissioned minister, but that the Church fired her for discriminatory reasons. The court cannot sustain her claim without overturning the determination of the Church body authorized to decide.

That is precisely what this Court prohibited in *Watson* and *Serbian*. Religious organizations have the right "to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association." *Serbian*, 426 U.S. at 711 (quoting *Watson*, 80 U.S. at 729).

> All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions * * * that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

Ibid. (emphasis omitted) (quoting *Watson*, 80 U.S. at 729).

Because Perich's claim would require the government to overturn the Church's decision on her fitness for ministry, it falls squarely within the ministerial exception.

b. Perich's claim of pretext would require the courts to decide religious questions.

Perich's claim of pretext would require the courts to decide religious questions. The Church says that it rescinded Perich's call for religious reasons—namely, her insubordination and disruption on February 22, and her threats to sue in violation of Church teaching. J.A. 55. Perich claims that these reasons are pretextual. No court can resolve this dispute without becoming entangled in religious questions.

i. Perich's threats to sue violated the Synod's longstanding teaching. The Synod has long taught that fellow believers generally should not sue one another in secular courts—and never over religious matters. Biblically, that teaching is rooted in 1 *Corinthians* 6:1-11, where the Apostle Paul denounced lawsuits between believers as scandalous. It is elaborated in Lutheran interpretations of that passage. *An Exegetical Study*, *supra* n.7.

The Synod's teaching is further embodied in an elaborate dispute resolution mechanism. Pet. App. 75a-104a. Disputes over called positions are at the very heart of this process: "The use of the Synod's conflict resolution procedures shall be the exclusive and final remedy for those who are in dispute. *Fitness for ministry and other theological matters must be determined within the church.*" Pet. App. 77a (emphasis added).

When Perich threatened to sue, the school principal's first reaction was that "we have a conflict resolution policy through our synod," and to sue the Church "is very, very much against what is expected of us as church workers when we sign on with our call." J.A. 152. The school board's view at the time of Perich's threat was that Perich "was not following the guidelines set out for called workers for a conflict resolution." J.A. 155. The president of the congregation testified that threatening a lawsuit "is not acceptable conduct of a call person. A call person there is—there is a dispute resolution process that they are required to—to go through." J.A. 96.

Thus, in response to Perich's threats to sue, the Church invoked a religious rule and made a religious decision. By flouting Lutheran teaching, Perich disqualified herself from service as a called minister. Just as a church might decide that it could not retain a minister who abused alcohol or seduced a parishioner, Hosanna-Tabor could decide that threatening to sue the Church was a serious sin that undermined religious credibility and destroyed the religious relationship.

This Court has upheld the rights of other churches that invoked similar doctrines restricting secular lawsuits over religious matters. In *Gonzalez*, the church argued "that the failure to take an appeal to the Pope from the decision of the archbishop, as provided by the canon law, precluded resort to legal proceedings." 280 U.S. at 17. The Court decided for the Church on other grounds. *Ibid.* In *Serbian*, the Court accepted the church's view that a bishop's "decision to litigate the Mother Church's authority in the civil courts rather than participate in the discip-

linary proceedings before the Holy Synod," and his "circumvention of the tribunals set up to resolve internal church disputes," were "clear substantive canonical violations." 426 U.S. at 720. See also *Watson*, 80 U.S. at 729 (quoted at p. 53, *supra*).

ii. In the face of the Synod's longstanding teaching, Perich claims that the religious justification for rescinding her call is a pretext. There is no way to resolve this claim without assessing the religious merit of the Church's reasons and how the Church applied them. Either inquiry would entangle the court in "the forbidden process of interpreting and weighing church doctrine." *Presbyterian Church*, 393 U.S. at 451.

To adjudicate pretext, a court must determine—at a minimum—whether the proffered legitimate reason or the alleged discriminatory reason actually motivated the job decision. *McDonnell Douglas*, 411 U.S. at 804-05; *Tomic*, 442 F.3d at 1040. If there is evidence of mixed motives, the court must determine whether the defendant would have made the same decision in the absence of the improper motive. *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90, 96-97 (2003).

In this case, Perich's insubordination and threats to sue cannot be separated from the religious obligations of a commissioned minister and the Church's teachings on internal dispute resolution. Perich's pretext claim would necessarily devolve into an investigation of the Church's beliefs. Do Lutherans really believe in non-litigious, internal resolution of disputes over fitness for ministry? Does that teaching apply to this case? Did it actually motivate the congregation? The parties would offer conflicting

evidence and arguments on Lutheran teaching. If sufficient resources were available, they would call experts, or alleged experts, in Lutheran theology. And the judge or jury would sit in judgment.

That would be precisely the "detailed review" that this Court prohibited in *Serbian*. 426 U.S. at 718. There, the Court held it unconstitutional to "evaluate[] conflicting testimony concerning internal church procedures." *Ibid.*; see also *Jones* v. *Wolf*, 443 U.S. at 602, 604; *Watson*, 80 U.S. at 728-29. Here, the inquiry is even more entangling than in *Serbian*: The question is not whether the Church followed its own internal procedures—an issue that is not in dispute—but whether the substantive decision was motivated by the Church's religious beliefs.

Applying this Court's cases, the courts of appeals have overwhelmingly agreed that the ministerial exception bars inquiries into pretext. Reviewing the reasons churches offer for their employment actions "would require the courts to determine the meaning of religious doctrine and canonical law and to impose a secular court's view of whether in the context of the particular case religious doctrine and canonical law support the decision the church authorities have made." *Scharon*, 929 F.2d at 363. See also, *e.g.*, *Rweyemamu*, 520 F.3d at 209; *Schleicher*, 518 F.3d at 475; *Catholic University*, 83 F.3d at 465-66. Most courts of appeals have gone further and held that the church need not even state its reason for an employment decision concerning a minister, see pp. 24-25, *supra*, thus precluding any possibility of considering whether that reason is pretextual. Because the First Amendment does not permit courts to decide reli-

gious questions, it does not permit courts to adjudicate Perich's claim.

iii. In holding that this case could proceed, the Sixth Circuit first appeared to indicate that the religious issues could be avoided by simply ignoring them. "Perich's claim would not require the court to analyze any church doctrine." Pet. App. 24a. But to ignore the religious issues would not avoid deciding them; it would simply decide them against the Church without analysis or explanation.

The Sixth Circuit also said that the Church did not "reference church doctrine or the LCMS dispute resolution procedures" in its letters to Perich. *Ibid.* The implication is that the Church's religious reasons must be a pretext, because they were not stated contemporaneously with the decision to seek rescission of Perich's call. But to find pretext is to decide the religious controversy—precisely what this Court's cases prohibit.

The statement is also unsound factually, because the Church *did* state its reasons: "[Y]ou have damaged, beyond repair, the working relationship you had with the Administration and School Board by threatening to take legal action" against the Church. J.A. 55. The Church was not required to recite the teaching that made the described behavior a religious offense. This was a letter within the Church, to a commissioned minister trained in church teachings. There was no need to recite what everyone already knew.

Finally, the Sixth Circuit said that courts could decide "whether a doctrinal basis actually motivated Hosanna-Tabor's actions." Pet. App. 24a. It gave no

reasons for this view, but it cited two cases, neither of which involved an employee within the ministerial exception. See *Geary* v. *Visitation School*, 7 F.3d 324, 330-31 (3d Cir. 1993) (explicitly distinguishing ministerial exception cases); *DeMarco* v. *Holy Cross High School*, 4 F.3d 166, 171-72 (2d Cir. 1993) (same). DeMarco was a math teacher, 4 F.3d at 168; Geary was described only as a "lay teacher," with no mention of any religious duties, 7 F.3d at 325. It is hardly surprising that entanglement problems become more severe as the plaintiff's duties become more religious. The Sixth Circuit's mistaken holding that it can decide Perich's pretext claim is derivative of its mistaken holding about Perich's religious functions.

C. Permitting Perich's claim to proceed would discriminate among churches based on how they allocate religious authority.

Different churches have allocated responsibilities between the clergy and the laity in a great variety of ways. Some have bright-line divisions between a clergy entrusted with nearly all the church's important religious functions and a laity entrusted with few or none. Some have no paid clergy. Others have a great variety of positions that exercise fewer religious responsibilities than an ordained pastor, but many more religious responsibilities than ordinary laity and staff.

The office of commissioned minister is such an in-between position. It is clearly distinguished from the ordinary laity and staff on one side, *The Ministry*, *supra* n.2, at 5, and from the ordained office of the public ministry on the other. *Id.* at 6. If such an in-

between office is excluded from the ministerial exception, the churches in the Synod lose the ability to select and control many of the people who perform important ministries.

A too-narrow ministerial exception, with no deference to religious understandings of mixed or in-between positions, would discriminate among churches. It would protect churches with a bright line between clergy and laity, but it would fail to protect the many theological alternatives. The Court should draw the boundaries of the ministerial exception in a way that protects the many variations in how churches allocate religious authority.

* * * * *

Any reasonable boundary to the ministerial exception would include Cheryl Perich. She led worship and prayer; she was the primary source of religious instruction for her students; she held ecclesiastical office; and she was removed from that office for violating church teaching. Her claim is barred by the ministerial exception.

CONCLUSION

The judgment of the Sixth Circuit should be reversed, and the judgment of the District Court should be reinstated.

Respectfully submitted.

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RESPONDENT'S BRIEF

No. 10-553

In the Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether the judicially recognized "ministerial exception" to the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (42 U.S.C. 12101 *et seq.*) bars review of the termination of a parochial school teacher who, although formally titled a commissioned minister, teaches primarily secular classes and performs the same job duties as noncommissioned lay teachers.

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In the Supreme Court of the United States

No. 10-553

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH & SCHOOL, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 597 F.3d 769. The opinion of the district court (Pet. App. 31a-53a) is reported at 582 F. Supp. 2d 881. The district court's opinion denying the motion for reconsideration (Pet. App. 54a-61a) is not published in the *Federal Supplement* but is available at 2008 WL 5111861.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 2010. A petition for rehearing was denied on June 24, 2010 (Pet. App. 62a-63a). On September 2,

2010, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including October 22, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondent Cheryl Perich filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), alleging that petitioner dismissed her as a teacher in violation of Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 327 (42 U.S.C. 12101 *et seq*). Pet. App. 9a. The EEOC sued petitioner for unlawful retaliation under the ADA, and Perich intervened. *Id.* at 9a-10a. The district court granted summary judgment to petitioner, but the court of appeals vacated and remanded. *Id.* at 10a, 25a.

1. Petitioner, an ecclesiastical corporation affiliated with the Lutheran Church-Missouri Synod (LCMS), operates a church and school in Redford, Michigan. Pet. App. 3a. The school serves children in pre-school through the eighth grade. *Ibid.* Petitioner's teachers are classified as "contract" teachers or "called" teachers. *Ibid.* Contract teachers are hired by the school's board for one-year renewable terms of employment, while called teachers are usually hired on an open-ended basis by the voting members of the church congregation, at the recommendation of its Board of Education, Board of Directors, and Board of Elders. *Ibid.* Petitioner employs staff, including teachers, who are not Lutheran, and requires all teachers—called or contract, Lutheran or not—to perform the same job duties. *Id.* at 5a.

A teacher becomes a called teacher by completing a course of study, called a "colloquy," at a Lutheran col-

lege and earning a certificate of admission into the teaching ministry of the LCMS. Pet. App. 3a. Called teachers are often tenured and cannot be summarily dismissed without cause. *Ibid.* Called teachers also may, under certain circumstances, claim a "housing allowance" on their income taxes, which reduces the amount of their taxable income. *Ibid.* Once hired, or "called," by a congregation, the teacher receives the title of "commissioned minister." *Ibid.*

In July 1999, petitioner hired Perich as a contract teacher to teach kindergarten for the 1999-2000 school year. Pet. App. 3a. In February 2000, Perich completed the required colloquy classes and became a called teacher. *Id.* at 3a-4a. Her employment duties remained identical to the ones she performed as a contract teacher. *Id.* at 4a.

Perich taught kindergarten for the next three years, and then fourth grade during the 2003-2004 school year. Pet. App. 4a. As she had done as a contract teacher, Perich taught secular subjects using secular textbooks; she taught math, language arts, social studies, science, gym, art, and music. *Id.* at 4a-5a. Perich also taught computer skills to her fourth-grade class. *Id.* at 4a. Music instruction included secular music theory and instruction in playing the recorder using the same music book as was used in the local public school. *Ibid.* Perich seldom introduced religion in her teaching of secular subjects. *Id.* at 5a (noting that Perich could recall only two instances in which she introduced religion into secular subjects).

In addition to the secular classes, Perich taught a religion class four days a week for 30 minutes and attended a chapel service with her class once a week for 30 minutes. Pet. App. 4a. She led each class in prayer

three times a day for a total of approximately five or six minutes. *Ibid.* During her final year, Perich's fourth-grade class engaged in a devotional activity for five to ten minutes each morning. *Ibid.* In all, activities devoted to religion consumed approximately 45 minutes of the seven-hour school day. *Ibid.* Approximately twice a year, Perich led the chapel service in rotation with other teachers, who all took turns leading chapel services regardless of whether they were called or contract, Lutheran or non-Lutheran. *Id.* at 4a-5a.

Perich was assigned to teach third and fourth grade for the 2004-2005 school year. In June 2004, Perich suddenly became ill and was hospitalized. Pet. App. 5a. By August, Perich's doctors had not yet reached a definitive diagnosis. *Ibid.* The school's principal, Stacey Hoeft, assured Perich that she would "still have a job with us" when she regained her health. *Ibid.* Perich applied for disability benefits and began a disability leave of absence at the beginning of the 2004-2005 school year. *Ibid.*

During her leave, Perich regularly provided Hoeft with updates about her medical condition and progress. Pet. App. 5a. In December 2004, Perich informed Hoeft that she had been diagnosed with narcolepsy and that her neurologist estimated that she would be able to return to work once her medications were adjusted, a process that usually takes about two months. *Id.* at 6a. In January 2005, Perich notified Hoeft "that she had discussed her work day and teaching responsibilities with her doctor, and he had assured her that she would be fully functional with the assistance of medication." *Ibid.*

On January 27, 2005, Perich notified Hoeft by email that she would be able to return to work between February 14 and February 28. Pet. App. 6a. Later that day,

Hoeft responded that she was surprised to hear Perich would be able to return so soon and "expressed concern that Perich's condition would jeopardize the safety of the students in her care." *Ibid.* Hoeft also informed Perich that once she was able to return, she would not teach third and fourth grades, because Hoeft had contracted a substitute to teach through the end of the year. *Id.* at 6a-7a.

Three days later, petitioner held its annual congregational "shareholder" meeting. Pet. App. 7a. Hoeft and the school's board told the voting members that it was unlikely that Perich would be physically capable of returning to the classroom that year or the next. *Ibid.* The congregation then adopted the school board's proposal that Perich be asked to "accept a peaceful release agreement" under which she would resign in exchange for the congregation's agreement to pay a portion of her health benefits through December 2005. *Ibid.*

On February 8, 2005, Perich received from her doctor a written release to return to work without restrictions on February 22, 2005. Pet. App. 7a. The next day, school board chairman Scott Salo called Perich to arrange a meeting to discuss her employment. *Ibid.* Perich asked instead to meet with the entire board, and a meeting was convened on February 13, 2005. *Ibid.* At the start of the meeting, Salo presented Perich with the proposal that she resign. *Ibid.* In response, Perich produced her unrestricted medical release, and said that she wanted to return to work on February 22, 2005, particularly because, as of that date, she would no longer be eligible for disability coverage. *Id.* at 7a-8a. The board urged Perich to reconsider and asked that she email her decision by February 21. *Id.* at 8a.

On February 21, Perich sent Hoeft an email confirming her decision not to resign and informing Hoeft that Perich planned to return to work the next day, February 22, 2005. Pet. App. 8a. Perich reported for work the next morning. *Ibid.* Petitioner's employee handbook stated that an employee's "[f]ailure to return to work on the first workday following the expiration of an approved leave of absence may be considered a voluntary termination." *Ibid.* Because Perich had informed petitioner that her doctor had released her to return to work as of February 22, Perich was concerned that her failure to report on that day might be construed as a resignation. *Ibid.*

Hoeft directed Perich to leave the school, and Perich complied once she obtained written confirmation that she had reported to work and was instructed to leave. Pet. App. 8a. The letter, signed by Hoeft and Salo, said that Perich "had provided improper notification of her return to work" and "asked that she continue her leave" while "the congregation * * * develop[ed] a possible plan for her return." *Ibid.* Perich then left the school grounds.

Later that day, Hoeft called Perich at home, informing her that she likely would be fired. Pet. App. 8a. During their conversation, Perich told Hoeft that she had spoken with an attorney and if they were unable to reach a compromise she intended to "assert her legal rights" against discrimination based on disability. *Ibid.* In an email to Hoeft that evening, Perich said that she had seen her doctor the previous day and he had confirmed that she was healthy and ready to return to work. *Ibid.* Following the school board's meeting on the evening of February 22, 2005, Salo sent Perich a letter "describing Perich's conduct as 'regrettable' and indicating

that the Board would review the process of rescinding her call based on her disruptive behavior." *Id.* at 9a.

On March 19, 2005, Salo informed Perich by letter that a congregational meeting was scheduled for April 10, 2005, and that the school board would recommend terminating her employment at that time. Pet. App. 9a. As grounds for termination, the letter cited "Perich's insubordination and disruptive behavior on February 22, 2005" and said that Perich had "'damaged, beyond repair' her working relationship with Hosanna-Tabor by 'threatening to take legal action.'" *Ibid.* At the congregational meeting on April 10, 2005, the congregation voted to rescind Perich's call, and on the next day, Salo informed Perich of her termination. *Ibid.*

2. Perich filed a charge with the EEOC alleging discrimination and retaliation in violation of the ADA. Pet. App. 9a. On September 28, 2007, the EEOC filed suit against petitioner, and Perich later intervened. *Id.* at 9a-10a; see 42 U.S.C. 12117(a) and 2000e-5(f)(1). Both the EEOC and Perich claimed unlawful retaliation under the ADA; Perich also claimed retaliation in violation of Michigan law. *Ibid.*

On cross-motions for summary judgment, the district court granted petitioner's motion, concluding that the ADA retaliation claim was barred by the judicially created "ministerial exception." See Pet. App. 41a, 53a. The court reasoned that Perich was a "ministerial employee" and that adjudication of her retaliation claim "would risk infringing upon Hosanna-Tabor's right to choose its spiritual leaders." *Id.* at 52a, 53a (internal citation, quotation marks, and alteration omitted).

3. The court of appeals vacated the district court's judgment and remanded for further proceedings. Pet. App. 25a. The court noted that "[t]o determine whether

an employee is ministerial"—and therefore barred by the ministerial exception from litigating employment claims against her religious employer—"this Circuit has instructed courts to look at the function, or 'primary duties' of the employee * * * rather than the fact of ordination." *Id.* at 16a-17a (quoting *Hollins* v. *United Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir.), cert. denied, 552 U.S. 857 (2007)).

The court of appeals noted that "the overwhelming majority of courts that have considered the issue have held that parochial school teachers such as Perich, who teach primarily secular subjects, do not classify as ministerial employees for purposes of the exception," Pet. App. 17a, and that, "when courts have found that teachers classify as ministerial employees for purposes of the exception, those teachers have generally taught primarily religious subjects or had a central role in the spiritual or pastoral mission of the church," *id.* at 18a-19a. The court concluded that the district court in this case erred in classifying Perich as a ministerial employee in light of undisputed evidence that: "Perich's employment duties were identical when she was a contract teacher and a called teacher"; "she taught math, language arts, social studies, science, gym, art, and music using secular textbooks" and "seldom introduced religion into secular discussions"; "teachers leading chapel or teaching religion were not required to be called or even Lutheran, and, in fact, at least one teacher was not"; and "activities devoted to religion"—such as religious instruction and prayer—"consumed approximately forty-five minutes of the seven hour school day." *Id.* at 19a-20a. Based on this record, the court found it "clear that Perich's primary function was teaching secular subjects, not 'spreading the faith, church governance, supervision of a reli-

gious order, or supervision or participation in religious ritual and worship.'" *Id.* at 20a (citation omitted).

Judge White concurred. Pet. App. 26a-30a. While she "read the relevant cases as more evenly split than [did] the majority," she agreed that "the ministerial exception does not bar this ADA action." *Id.* at 26a (footnote omitted). She explained that this case differs from other cases in which courts found parochial school teachers to be ministerial employees because "there is evidence here that the school itself did not envision its teachers as religious leaders, or as occupying 'ministerial' roles." *Id.* at 29a. Judge White noted that petitioner's "teachers are not required to be called or even Lutheran to teach or to lead daily religious activities," and that "the duties of the contract teachers are the same as the duties of the called teachers." *Ibid.* For that reason, Judge White concluded, "even courts that have found ministerial plaintiffs who have daily schedules that have roughly the same ratio of religious to non-religious activities as Perich would find that the ministerial exception should not apply here." *Id.* at 30a.

ARGUMENT

Petitioner renews its contention that its decision to terminate Perich is rendered judicially unreviewable by the ministerial exception to the ADA. The court of appeal correctly rejected that contention, and its decision does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. The ADA prohibits discrimination and retaliation by "covered entit[ies]" and "person[s]" respectively, including religious institutions and persons employed by religious institutions. See 42 U.S.C. 12112(a) ("covered

entity" may not discriminate on the basis of disability); 42 U.S.C. 12203(a) ("No person shall discriminate against any individual" in retaliation for protected activity.); 42 U.S.C. 12111(2) ("covered entity" includes an "employer"); 42 U.S.C. 12111(7) (cross-referencing 42 U.S.C. 2000e) (definition of "person"). The statute includes certain "[d]efenses" for religious entities, but neither is applicable here. 42 U.S.C. 12113(c) ("Religious entities" may give "preference in employment to individuals of a particular religion" and may "require that all applicants and employees conform to the religious tenets of such organization.").[1]

In addition to the express statutory defenses for religious entities, the courts of appeals have recognized a

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[1] The EEOC's ADA regulations explain:

> Religious organizations are not exempt from title I of the ADA or [these regulations]. A religious [entity] may give a preference in employment to individuals of the particular religion, and may require that applicants and employees conform to the religious tenants of the organization. However, a religious organization may not discriminate against an individual who satisfies the permitted religious criteria because that individual is disabled. The religious entity, in other words, is required to consider qualified individuals with disabilities who satisfy the permitted religious criteria on an equal basis with qualified individuals without disabilities who similarly satisfy the religious criteria.

29 C.F.R. Pt. 1630, App.; accord H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 76 (1990) (House Report).

The ADA's legislative history indicates an intent that the ADA's prohibition on discrimination be "interpreted in a manner consistent with title VII * * * as it applies to the employment relationship between a religious organization and those who minister on its behalf." House Report at 75-76; see S. Rep. No. 116, 101st Cong., 1st Sess. 42 (1989) (same). Title VII provides that religious schools may "hire and employ employees of a particular religion," 42 U.S.C. 2000e-2(e)(2), but does not otherwise provide an exemption for religious institutions.

constitutionally rooted "ministerial exception" barring adjudication of certain claims regarding the employment relationship between religious institutions and ministers and other ministerial employees. See, *e.g.*, *McClure* v. *Salvation Army*, 460 F.2d 553, 559, 560 (5th Cir.) ("The minister is the chief instrument by which the church seeks to fulfill its purpose. * * * [A]pplication of the provisions of Title VII to the employment relationship * * * between a church and its minister would result in an encroachment by the State into an area of religious freedom."), cert. denied, 409 U.S. 896 (1972). The ministerial exception does not, however, bar all employment claims against religious institutions. See *Rayburn* v. *General Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171-1172 (4th Cir. 1985) ("[C]hurches are not—and should not be—above the law. * * * Their employment decisions may be subject to Title VII scrutiny, where the decision does not involve the church's spiritual functions."), cert. denied, 478 U.S. 1020 (1986).

2. After conducting a fact-intensive examination of Perich's "function, or 'primary duties'" within the school, the court of appeals in this case concluded that the ministerial exception does not bar review of Perich's allegedly retaliatory termination in violation of the ADA because she was not a ministerial employee. Pet. App. 16a-23a. The court found significant that Perich's duties were "identical" when she was a contract teacher and a called teacher; that, as a general matter, the primary duties of called teachers were "identical" to those of contract teachers; that Perich taught multiple secular subjects using secular textbooks; and that religious instruction comprised a small part of the school day. *Id.* at 19a, 23a; see *id.* at 34a. The fact that Perich led chapel twice a year in rotation with other teachers did not make her

a minister for purposes of the ministerial exception, the court noted, since even non-Lutheran secular teachers performed this role. *Id.* at 19a-20a.

The court's fact-intensive determination that the ministerial exception does not bar claims concerning Perich's termination, given the marked similarity between her duties and those of non-commissioned lay teachers, is correct and does not warrant further review.

3. Petitioner contends that there is a conflict among the courts of appeals about whether applicability of the ministerial exception should be determined by a "'primary duties' test." Pet. 11. As explained below, petitioner did not adequately preserve her challenge to the validity of the "primary duties" test below, so this case does not properly present this question. In any event, despite some variations in courts' articulations of the governing test, there is no conflict that warrants this Court's review. Moreover, every published court of appeals decision has found the exception inapplicable to claims like the one at issue here, concerning a teacher of primarily secular subjects at religious schools. Petitioner offers no persuasive reason to believe that the outcome of this case would be different in any other circuit.

a. As petitioner notes, the Third, Fourth, Sixth, and D.C. Circuits have held that in evaluating an employee's eligibility for the ministerial exception courts should examine whether "her primary duties include 'teaching, spreading the faith, church governance, supervision of a religious order, or supervision of participation in religious ritual and worship.'" *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 304 n.6 (3d Cir. 2006) (quoting *Rayburn*, 772 F.2d at 1169), cert. denied, 550 U.S. 903 (2007); see *Rayburn*, 772 F.2d at 1169 (4th Cir.); Pet. App. 16a-17a

(6th Cir.); *EEOC* v. *Catholic Univ. of Am.*, 83 F.3d 455, 465 (D.C. Cir. 1996).

Although petitioner contends that the Eighth and Tenth Circuits follow a "case-by-case" approach, both courts have also relied on examination of the employee's primary duties. See *Skrzypczak* v. *Roman Catholic Diocese*, 611 F.3d 1238, 1243 (10th Cir. 2010) (discussing employee's "job description, which included a list of her primary duties," and concluding that the plaintiff's position was "'important to the spiritual and pastoral mission of the [Diocese]'") (quoting *Rayburn*, 772 F.2d at 1169) (alteration in original), petition for cert. pending, No. 10-769 (filed Nov. 5, 2010); *Scharon* v. *St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 363 (8th Cir. 1991) (concluding that employee's "position as Chaplain [was] primarily a 'ministerial' position"); see also *Alcazar* v. *Corporation of the Catholic Archbishop*, No. 09-35003, 2010 WL 5029533, at *1 (9th Cir. Dec. 10, 2010) (en banc) (identifying Tenth Circuit as a court that "utilize[s] the 'primary duties' test" and the Eight Circuit as one that "use[s] a version" of it).

b. Petitioner argues that the court of appeals' application of the primary duties test in this case squarely conflicts with decisions of the Second, Fifth, Seventh, and Ninth Circuits, all of which, it contends, have rejected the "primary duties" test in favor of other approaches. That is incorrect.

After the petition was filed in this case, the en banc Ninth Circuit unanimously vacated the portion of the panel decision in *Alcazar* v. *Corporation of the Catholic Archbishop*, 598 F.3d 668 (2010), on which petitioner relies (Pet. 12). See 2010 WL 5029533, at *1. The en banc court declined to "adopt a general test for determining whether a person is a 'minister'" because the

employee at issue (a church seminarian) was "a minister under any reasonable interpretation of the exception." *Ibid.*

Similarly, the Second Circuit has found it unnecessary to adopt a general test on the scope of the ministerial exception. In *Rweyemamu* v. *Cote*, 520 F.3d 198 (2008), that court "agree[d] that courts should consider the 'function' of an employee, rather than his title or the fact of his ordination," but, in dicta, said such an approach could prove "too rigid," depending on "the nature of the dispute." *Id.* at 208.[2] The court found it unnecessary, however, to "attempt to delineate the boundaries of the ministerial exception" because the plaintiff before it (a priest who contended that his bishop "misapplied canon law in denying him a requested promotion," *id.* at 199) "easily fell]" within the exception. *Id.* at 209.

Petitioner argues that the Fifth Circuit "ignore[d]" the primary duties test and "appl[ied] a different test." Pet. 12 (citing *Starkman* v. *Evans*, 198 F.3d 173, 176-177 (1999), cert. denied, 531 U.S. 814 (2000)). But in *Starkman*, the court stated that to determine whether the ministerial exception controls, the court will "examine the employment duties and requirements of the plaintiff as well as her actual role at the church" and that the ministerial exception applies to employees "whose *primary functions* serve its spiritual and pastoral mission." 198 F.3d at 175-176 (emphasis added) (citing *Rayburn*, 772 F.2d at 1169, and *Catholic Univ. of Am.*, 83 F.3d at

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[2] In particular, the Second Circuit expressed concern that a "too rigid" application of a functional approach could lead to exclusion of some claims by lay persons that were rooted in religious doctrine from the ministerial exception while at the same time including straightforward tort or contract claims by ordained ministers. *Rweyemamu*, 520 F.3d at 208. Neither circumstance was presented in that case.

461). The Fifth Circuit concluded that a church choirmaster and music director—who was hired based upon religious criteria, planned worship liturgy, coordinated church and worship activities related to the church's music ministry, performed many other religious duties, and ministered to ailing parishioners—was a "spiritual leader" for purposes of the ministerial exception. *Id.* at 176-177. The Fifth Circuit, like the Sixth Circuit in this case, considered whether the plaintiff's primary duties were secular or religious, noting that the plaintiff in an interrogatory "list[ed] twenty-one duties under the category of religious or worship-oriented job duties, compared to only three entries for nonreligous, nonworship-oriented, or secular duties" and also "list[ed] nineteen of the twenty[-]one religious tasks as 'essential,'" while she designates all of her three nonreligious duties as 'non essential.'" *Id.* at 176.[3]

Finally, the Seventh Circuit likewise has held that "[i]n determining whether an employee is considered a minister for the purposes of applying [the ministerial]

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[3] Petitioner also contends (Pet. 23-24 & n.3) that the Fifth Circuit applied a "different test" in *Combs* v. *Central Texas Annual Conference of the United Methodist Church*, 173 F.3d 343 (1999), and "cited or discussed the cases applying the primary duties test, but [did not] adopt it." The question before the Fifth Circuit in *Combs* was not whether the plaintiff was a minister, see *id.* at 345 n.1 ("All parties agree that, at least for the purposes of this appeal, the following facts are true: Reverend Combs was a member of the clergy performing traditional clerical functions."), but whether the ministerial exception itself survived this Court's decision in *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990). See *Combs*, 173 F.3d at 345 ("The question before us is whether the Free Exercise Clause of the First Amendment deprives a federal court of jurisdiction to hear a Title VII employment discrimination suit brought against a church by a member of its clergy.").

exception, we do not look to ordination but instead to the function of the position." *Alicea-Hernandez* v. *Catholic Bishop*, 320 F.3d 698, 703 (2003). In *Alicea-Hernandez*, the court concluded the ministerial exception applied to the Hispanic Communications Manager of the Archdiocese of Chicago whose duties included composing media releases; composing correspondence for the Cardinal; composing articles for Church publications; and translating Church materials into Spanish, among other things, because her "role [as] press secretary is critical in message dissemination, and a church's message * * * is of singular importance." *Id.* at 703-704.

In a subsequent case, the Seventh Circuit considered whether ordained ministers of the Salvation Army who administered an Adult Rehabilitation Center were barred by the ministerial exception from bringing suit under the minimum-wage and overtime provisions of the Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (29 U.S.C. 201 *et seq.*). See *Schleicher* v. *Salvation Army*, 518 F.3d 471, 474 (7th Cir. 2008) (Posner, J.). The court concluded that the ministerial exception applied, explaining that the evidence showed that "a Salvation Army Adult Rehabilitation Center is a church, and, like a church, it is administered by church officials." *Id.* at 476. The court rejected plaintiffs' argument that the Adult Rehabilitation Center's operation of thrift shops altered the analysis, noting that "the commercial tail must not be allowed to wag the ecclesiastical body," particularly given the "spiritual dimension" of the commercial activities at issue. *Id.* at 477-478.

Although petitioner describes that analysis as a "totally different approach," Pet. 25, the Seventh Circuit's fact-intensive inquiry into the nature of the position at issue is not materially different from that conducted by

other courts. The court in *Schleicher* found the ministerial exception applicable to "properly ordained ministers" whose jobs comprised "'preaching,' 'leading worship singing,' 'overseeing or leading daily devotions,' 'overseeing or teaching Bible studies' to the residents, 'overseeing or conducting Christian living classes' for them, and teaching 'soldiers classes,' which are classes for prospective Salvation Army ministers." 518 F.3d at 477, 478. Such ministers likely would fall within the ministerial exception under any court's approach.

c. In any event, petitioner fails to demonstrate that this case would have been decided differently in any other circuit. Every published court of appeals decision to address the question (including those from the Second, Fifth, and Ninth Circuits) holds that parochial school faculty who, like Perich, are assigned to teach primarily secular subjects, are not covered by the ministerial exception.[4]

[4] See *Geary* v. *Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 331 (3d Cir. 1993) (Catholic elementary school teacher, "notwithstanding [her] apparent general employment obligation to be a visible witness to the Catholic Church's philosophy and principles"); *DeMarco* v. *Holy Cross High Sch.*, 4 F.3d 166, 172-173 (2d Cir. 1993) (Catholic high school teacher, whose religious duties included leading class in prayers and attending mass); *DeArment* v. *D.L. Harvey*, 932 F.2d 721, 721-722 (8th Cir. 1991) ("'born-again' Christian" class supervisors and monitors who regard teaching as "their personal ministry" and "conduct prayer and counsel" students in "a self-study program that teaches all subjects from a biblical point of view"); *Dole* v. *Shenandoah Baptist Church*, 899 F.2d 1389, 1392, 1396-1397 (4th Cir.) (teachers at K-12 school "with a full-time curriculum that included instruction in Bible study and in traditional academic subjects into which biblical material had been integrated"), cert. denied, 498 U.S. 846 (1990); *Ritter* v. *Mount St. Mary's Coll.*, 814 F.2d 986, 988 n.1 (4th Cir.) (education professor's claims "did not present a significant risk of infringement upon the First Amendment rights of Mount Saint Mary's

Petitioner relies (Pet. 20-22) on the Fourth Circuit's non-precedential ruling in *Clapper* v. *Chesapeake Conference of Seventh-Day Adventists*, 166 F.3d 1208 (Table), No. 97-2648, 1998 WL 904528 (Dec. 29, 1998), cert. denied, 526 U.S. 1145 (1999), the only federal appellate opinion to hold that the ministerial exception applies to a parochial school teacher. But as the court of appeals in this case explained, petitioner's invocation of the ministerial exception would fail even under the rationale of *Clapper* because "nothing in the record" indicates that petitioner relied on its teachers "to indoctrinate its faithful into its theology" in the way the school at issue in *Clapper* did. Pet. App. 22a. While the teacher in *Clapper* was required to "incorporate the teachings of the Seventh-day Adventist Church whenever possible" into her secular teaching, Perich only "twice in her career * * * introduced the topic of religion during secular discussions." *Id.* at 21a-22a (quoting *Clapper*, 1998 WL 904528, at *7); see *id.* at 29a (White, J., concurring); *id.* at 5a. In addition, unlike in *Clapper*, there was no "predominantly religious yardstick for qualification as a teacher" at Hosanna-Tabor; its "teachers [were] not required to be called or even Lutheran to teach or to

College"), cert. denied, 484 U.S. 913 (1987); *EEOC* v. *Fremont Christian Sch.*, 781 F.2d 1362, 1364, 1369-1370 (9th Cir. 1986) (teachers who occupied a "highly specialized role" at Christian school that church considered "a ministry" and "an integral part of the religious mission of the [c]hurch to its children"); *EEOC* v. *Mississippi Coll.*, 626 F.2d 477, 485-486 (5th Cir. 1980) (faculty and staff of Baptist college who were "expected to serve as exemplars of practicing Christians"); see also *Elvig* v. *Presbyterian Church*, 397 F.3d 790, 797 (9th Cir. 2005) (Kozinski, J., concurring in the order denying rehearing en banc) (ministerial exception would not apply "to a female English teacher at a church-run elementary school").

lead daily religious activities." *Id.* at 29a (White, J., concurring).

Indeed, in an earlier published decision, *Dole* v. *Shenandoah Baptist Church*, 899 F.2d 1389, cert. denied, 498 U.S. 846 (1990), the Fourth Circuit concluded that pay discrimination claims of teachers at a K-12 school "with a full-time curriculum that included instruction in Bible study and in traditional academic subjects into which biblical material had been integrated," were not covered by the ministerial exception. *Id.* at 1396-1397. Similarly, the Fourth Circuit permitted a suit by a lay professor against a religious college, noting that the employment discrimination action "did not present a significant risk of infringement upon the First Amendment rights" of the college. See *Ritter* v. *Mount St. Mary's Coll.*, 814 F.2d 986, 988 n.1, cert. denied, 498 U.S. 846 (1987).

Petitioner also contends (Pet. 21-23) that the court of appeals' decision "squarely conflicts" with the decision of the Wisconsin Supreme Court in *Coulee Catholic Schools* v. *Labor & Industry Review Commission*, 768 N.W.2d 868, 872 (2009). That is incorrect. The court in *Coulee* agreed with other courts that "it is the function of the position that is primary" when considering whether the ministerial exception is applicable. *Id.* at 881 (citing *Rayburn*, 772 F.2d at 1168-1169). While the Wisconsin Supreme Court criticized a purely "quantitative analysis" of a teacher's duties, it, like other courts, engaged in a "highly fact-specific" examination of the plaintiff's position to determine "how important or closely linked the employee's work is to the fundamental mission of that organization." *Id.* at 883.

The court in *Coulee* made clear that it was "not giving a blanket exception to all religious school teachers"

and stressed that "[f]uture cases along these lines will necessarily be very fact-sensitive." 768 N.W.2d at 891. Critically, *Coulee*'s "heavily fact-dependent" inquiry (*id.* at 887), revealed that the teacher in question "made efforts to integrate Catholicism into all her subjects," both secular and religious. *Id.* at 891. Here, by contrast, Perich did not do so. Pet. App. 5a, 19a, 21a.[5]

4. Petitioner contends (Pet. 25-32) that the court of appeals' decision conflicts with decisions of this Court. That contention is incorrect and does not warrant this Court's review.

As an initial matter, the court of appeals' decision that the ministerial exception does not bar adjudication of the claim of unlawful retaliation against Perich does not involve "state interference in matters of church governance" (Pet. 26) as did *Gonzalez* v. *Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929); *Kedroff* v. *Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94 (1952); and *Serbian Eastern Orthodox* v. *Milivojevich*, 426 U.S. 696 (1979). All those decisions involved essentially ecclesiastical disputes over religious control, doctrines, practices, or property.[6] By

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[5] In addition, *Coulee*'s discussion of the federal Constitution was unnecessary to its disposition of the case. The employee there had asserted only a state-law claim, and the court found it barred by the ministerial exception based on Wisconsin's constitution, which has "specific and expansive language" and "provides much broader protections for religious liberty than the First Amendment." 768 N.W.2d at 887; see *id.* at 887 n.28 (noting that court's "holding that the Wisconsin Constitution provides * * * for the ministerial exception's broader application" would stand even if First Amendment were held inapplicable).

[6] *Gonzalez* involved a dispute over entitlement to certain income under a will that turned upon an ecclesiastical determination as to whether an individual would be appointed to a chaplaincy in the Roman Catholic Church, a "purely ecclesiastical matter[]." 280 U.S. at 16. *Kedroff*

contrast, this case presents an employment discrimination claim by a teacher at a religious school who taught primarily secular subjects and whose job responsibilities were indistinguishable from those of her non-commissioned lay colleagues.

Nor would adjudication of this case require a court to "decid[e] religious questions," as petitioner argues. Pet. 29. While petitioner's counsel now claims that petitioner dismissed Perich "for doctrinal reasons," *i.e.*, because she failed to utilize "the Synod's dispute resolution process," Pet. 30, "none of the letters that Hosanna-Tabor sent to Perich throughout her termination process reference church doctrine or the LCMS dispute resolution process," Pet. App. 24a. A court would "violate[] no constitutional rights by merely investigating the circumstances of [Perich's] discharge in this case, if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge." *Ohio Civil Rights Comm'n* v. *Dayton Christian Schs., Inc.*, 477 U.S. 619, 628 (1986).[7]

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involved a New York statute that put the Russian Orthodox churches of New York under the administration of the Russian Church in America and a subsequent dispute over who controlled the Saint Nicholas Cathedral in New York City, "strictly a matter of ecclesiastical government." 344 U.S. at 115. *Serbian Eastern Orthodox* involved a dispute over a defrocked bishop, the resolution of which "affect[ed] the control of church property in addition to the structure and administration of the American-Canadian Diocese." 426 U.S. at 698, 708-724.

[7] The Court in *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), was concerned that providing collective bargaining rights to parochial school teachers would be highly intrusive and would require constant monitoring touching all aspects of employment. See *id.* at 503 (noting that collective bargaining would permit negotiations over "nearly everything that goes on in the schools" (internal quotation marks and citations omitted)). An employment discrimination action brought by

Nor is it the case, as petitioner suggests, that a court impermissibly decides a religious question when it looks behind a defendant's assertions about "which duties [are] secular and which [are] religious," Pet. 29, by, for example, considering whether the duties in question are also performed by non-commissioned lay personnel. A contrary rule would illogically expand the scope of the ministerial exception, permitting a religious institution to deny all of its employees the protections of the employment discrimination laws simply by characterizing all of their duties as religious. See *Schleicher*, 518 F.3d at 478.

Likewise, the court of appeals' decision in this case creates no conflict with this Court's freedom of association cases. To the contrary, this Court has repeatedly held that prohibiting discrimination is "a state interest[] of the highest order" that generally outweighs any burden on the freedom of association that anti-discrimination laws impose. See *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623-624 (1984) (law requiring Jaycees to admit women did not violate their free exercise rights); *Board of Dirs. of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U.S. 537 (1987) (law requiring Rotary to admit women did not violate the First Amendment); *New York State Club Assoc.* v. *City of New York*, 487 U.S. 1 (1988) (upholding the constitutionality of a city ordinance prohibiting discrimination by clubs that have more than 400 members and provide regular meal service).[8] And as

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a teacher of secular subjects presents no similar concerns.

[8] Although this Court has recognized that freedom of expression protects a right to discrimination where the discrimination itself is integral to the expressive activity, see *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 651, 659 (2000); *Hurley* v. *Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 580-581 (1995), petitioner did

this Court has made clear, it is not the case "that all teaching in a sectarian school is religious." *Board of Educ.* v. *Allen*, 392 U.S. 236, 248 (1968). Where, as here, a teacher at a religious school teaches primarily secular subjects and performs duties indistinguishable from her non-commissioned lay colleagues, judicial review of her termination under the ADA creates no conflict with principles of associational freedom.

4. Finally, even if the matters petitioner raises otherwise warranted review, this would not be a suitable vehicle for two independent reasons.

a. Petitioner has waived its claim that the court of appeals erred by determining the applicability of the ministerial exception based on application of a "primary duties" test. Petitioner did not question the validity of that test before the court of appeals issued its decision; instead, petitioner accepted the test and argued that it should prevail under it. See Pet. C.A. Br. 29 ("As a general rule, the ministerial exception will be invoked if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship.") (quoting *Hollins* v. *United Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir.), cert. denied, 552 U.S. 857 (2007)). Indeed, petitioner below characterized the Sixth Circuit's decision in *Hollins*—which adopted the primary duties test, see 474 F.3d at

not tell Perich it was terminating her because discrimination or retaliation was integral to its message or its religious beliefs. Indeed, its policies said just the opposite: "[T]he LCMS personnel manual, which includes EEOC policy, and the Governing Manual for Lutheran Schools clearly contemplate that teachers are protected by employment discrimination and contract laws." Pet. App. 24a.

226—as a "prudent[]" application of the ministerial exception. Pet. C.A. Br. 28.[9]

b. The Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (42 U.S.C. 2000bb *et seq.*), prohibits the federal government "as a statutory matter" from "substantially burden[ing] a person's exercise of religion, 'even if the burden results from a rule of general applicability.'" *Gonzalez* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (quoting 42 U.S.C. 2000bb-1(a)). The statute creates an exception if the government "satisf[ies] the compelling interest test." *Ibid.* The Second Circuit has held that RFRA may provide a defense to certain employment discrimination claims asserted by ministers and that, if preserved, the merits of that defense should be considered before addressing the constitutionally based ministerial exception. See *Hankins* v. *Lyght*, 441 F.3d 96, 102-103 (2006); *Rweyemamu*, 520 F.3d at 202-204 (finding RFRA defense waived); see also *Catholic Univ. of Am.*, 83 F.3d at 467-470 (addressing defendant's RFRA defense as alternative to ministerial exception defense); cf. *Fusari* v. *Steinberg*, 419 U.S. 379, 387 n.13 (1975) (Court is "compelled" to consider "a statutory claim that may be dispositive before considering a difficult constitutional issue"). Petitioner in this case, however, has waived any claim under RFRA, and thus

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[9] Petitioner challenged the "primary duties" test for the first time in its rehearing petition, see Pet. for Reh'g iv, but "[i]t has been the traditional practice of this Court • • • to decline to review claims raised for the first time on rehearing in the court below." *Wills* v. *Texas*, 511 U.S. 1097, 1097 (1994) (O'Connor, J., concurring in denial of certiorari); *Al-Ghorbani* v. *Holder*, 594 F.3d 546, 547 (6th Cir. 2010) ("[O]ur long-established rule is that this court will not consider arguments raised for the first time in a petition for rehearing.").

has not afforded the courts an opportunity to consider that possible nonconstitutional ground for the relief it seeks. For that reason as well, further review in this case is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 10-553

In the Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether application of the anti-retaliation provision of the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*, to this case violates the Free Exercise Clause, petitioner's right to freedom of association, or the Establishment Clause.

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BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 597 F.3d 769. The opinion of the district court (Pet. App. 31a-53a) is reported at 582 F. Supp. 2d 881. The opinion of the district court denying a motion for reconsideration (Pet. App. 54a-61a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 2010. A petition for rehearing was denied on June 24, 2010 (Pet. App. 62a-63a). On September 2, 2010, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including

October 22, 2010, and the petition was filed on that date. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reprinted in the appendix to this brief. App., *infra*, 1a-13a.

STATEMENT

1. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, prohibits an employer with 15 or more employees from discriminating against a qualified individual with a disability in all terms and conditions of employment. See 42 U.S.C. 12111(5), 12112(a).[1] A separate provision of the ADA prohibits discrimination "against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under [the ADA]." 42 U.S.C. 12203(a).[2]

The ADA provides religious entities with two defenses to claims of disability discrimination in employment. 42 U.S.C. 12113. First, a "religious corporation, association, educational institution, or society" may "giv[e] preference in employment to individuals of a par-

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[1] Unless otherwise indicated, all statutory citations are to the 2006 edition of the United States Code.

[2] The ADA also makes it "unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by [the ADA]." 42 U.S.C. 12203(b).

ticular religion to perform work connected with the carrying on by such [entity] of its activities." 42 U.S.C. 12113(c)(1). Second, "a religious organization may require that all applicants and employees conform to the religious tenets of such organization." 42 U.S.C. 12113(c)(2).[3] The ADA contains no defenses for religious entities that retaliate against employees in violation of Section 12203.

2. a. Petitioner is an ecclesiastical corporation affiliated with the Lutheran Church-Missouri Synod (LCMS or Synod). At the time of the events giving rise to this suit, petitioner operated a school serving children in kindergarten through the eighth grade in Redford, Michigan. Pet. App. 3a. That school has since closed. See Pet. Br. 3 n.1.

Teachers at the school were classified in two categories: "contract" and "called." Pet. App. 3a. Contract teachers were hired by the school's board for one-year renewable terms of employment. Called teachers were usually hired on an open-ended basis by the voting members of the church congregation. *Ibid.* A teacher could become a called teacher by completing a course of study, called a "colloquy," and earning a certificate of admission into the teaching ministry of the LCMS. *Ibid.* Once "called" by a congregation, the teacher received the title of "commissioned minister." *Ibid.* Petitioner required all teachers—called or contract, Lutheran or not—to perform the same job duties. *Id.* at 5a.

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[3] Both of these defenses apply under "[t]his subchapter" of the ADA, *i.e.*, Subchapter I, which prohibits discrimination based on disability in employment. The ADA's prohibitions against retaliation and coercion, see 42 U.S.C. 12203, appear in a different subchapter (Subchapter IV), which includes no comparable defenses for religious entities.

b. The LCMS's *Employment Resource Manual for Congregations and Districts* acknowledges that the civil rights laws, and the ADA in particular, apply to LCMS churches and schools. The manual states that LCMS churches and schools "may not discriminate against a qualified individual because of his or her disability, [but] churches may prefer employees of a particular religion for carrying out the organization's activities. In addition, church[es] may require applicants (disabled and non-disabled) and employees to conf[o]rm to their religious tenets." LCMS, *Employment Resource Manual for Congregations and Districts* (June 2003), www.lcms.org/Document.fdoc?src=lcm&id=1188; see Pet. App. 24a.

c. In July 1999, petitioner hired respondent Cheryl Perich as a contract teacher to teach kindergarten for the 1999-2000 school year. Pet. App. 3a. Perich completed the required colloquy classes and became a called teacher in 2000. *Id.* at 3a-4a. Her duties remained the same after she was hired as a called teacher. *Id.* at 4a.

Perich taught kindergarten for the next three years, and taught fourth grade during the 2003-2004 school year. Pet. App. 4a. As she had done as a contract teacher, Perich taught secular subjects including math, language arts, social studies, science, gym, art, music, and computer skills. *Id.* at 4a-5a. In her teaching, Perich used "secular textbooks commonly used in public schools." *Id.* at 5a. Perich could recall only two instances in which she introduced religion into her teaching of secular subjects. *Ibid.*

In addition to their secular teaching duties, contract and called teachers alike engaged in certain religious activities. Pet. App. 4a-5a. Perich, like the contract teachers, taught a religion class four days a week for 30

minutes and attended a chapel service with her class once a week for 30 minutes. *Id.* at 4a. Perich, like the contract teachers, led each class in prayer three times a day for a total of approximately five or six minutes. *Ibid.* During her final year, Perich's fourth-grade class engaged in a devotional for five to ten minutes each morning. *Ibid.* Approximately twice a year, Perich led the chapel service. Teachers all took turns leading chapel services regardless of whether they were called or contract, Lutheran or non-Lutheran. *Id.* at 4a-5a.

Perich was assigned to teach third and fourth grade for the 2004-2005 school year. Pet. App. 4a. In June 2004, however, Perich became ill and was hospitalized. *Id.* at 5a. By August, Perich's doctors had not yet diagnosed her illness. *Ibid.* The school's principal, Stacey Hoeft, assured Perich that she would "still have a job with [the school]" when she regained her health. *Ibid.*; see J.A. 161. Perich applied for disability benefits and began a disability leave of absence at the beginning of the 2004-2005 school year. Pet. App. 5a.

In December 2004, Perich informed Hoeft that she had been diagnosed with narcolepsy and that her doctor estimated that she would be able to return to work once her medications were adjusted, a process that usually takes about two months. Pet. App. 6a. In January 2005, Perich notified Hoeft "that she had discussed her work day and teaching responsibilities with her doctor, and he had assured her that she would be fully functional with the assistance of medication." *Ibid.*

On January 27, 2005, Perich notified Hoeft by email that she would be able to return to work between February 14 and February 28. J.A. 172. Later that day, Hoeft responded that she was surprised to hear Perich would be able to return so soon and "expressed concern

that Perich's condition would jeopardize the safety of the students in her care." Pet. App. 6a; see J.A. 173-174. Hoeft also informed Perich that once she was able to return, she would not teach third and fourth grades, because Hoeft had contracted a substitute to teach through the end of the year. Pet. App. at 6a-7a. The hired replacement teacher was a contract teacher. J.A. 134.

Three days later, petitioner held its annual congregational "shareholder" meeting. Pet. App. 7a. Notwithstanding Perich's notification that she could return to work sometime in February, Hoeft and the school's board told the voting members of the congregation that it was unlikely that Perich would be physically capable of returning to the classroom that school year or the next. *Ibid.* The congregation then adopted the board's proposal that Perich be asked to "accept a peaceful release agreement" under which she would resign in exchange for the congregation's agreement to pay a portion of her health insurance premiums through December 2005. *Ibid.*

On February 8, Perich's physician gave her a written release to return to work without restrictions starting on February 22. Pet. App. 7a. On February 13, Perich met with the school board. *Ibid.* At that meeting, board chairman Scott Salo presented Perich with the proposal that she resign; in response, Perich produced her medical release, and said that she wanted to return to work on February 22. *Id.* at 7a-8a. The board urged Perich to reconsider her refusal to resign and asked that she provide her decision by February 21. *Id.* at 8a.

On February 21, Perich sent Hoeft an email confirming her decision not to resign and informing Hoeft that Perich planned to return to work the next day, Febru-

ary 22. Pet. App. 8a. Perich reported for work the next morning, the first day on which she was medically cleared to work. *Ibid.* She did so because she feared that a failure to report would be construed as a resignation under the terms of petitioner's employee handbook, which provided that an employee's "failure to return to work on the first day following the expiration of an approved medical leave may be considered a voluntary termination." *Ibid.*

Hoeft directed Perich to leave the school. J.A. 115. She told Perich that "I'm not the only person that doesn't want you here. Parents have told me that they would be uncomfortable with you in the building." *Ibid.* Perich left after she obtained written confirmation that she had reported to work and was instructed to leave. Pet. App. 8a.

Later that same day, Hoeft called Perich at home, informing her that she likely would be fired. Pet. App. 8a; J.A. 115. During their conversation, Perich told Hoeft that she had spoken with an attorney and if they were unable to reach a compromise she intended to "assert her legal rights" against discrimination based on disability. J.A. 115. In an email to Hoeft that evening, Perich said that her doctor had "reaffirmed" that she was healthy and ready to return to work. Pet. App. 8a.

Following a school board meeting on the evening of February 22, Salo sent Perich a letter describing her conduct as "regrettable" and stating that the board would begin the process of rescinding her call based on her "disruptive behavior." Pet. App. 8a-9a. On March 19, Salo informed Perich by letter that a congregational meeting was scheduled for April 10, and that the school board would recommend terminating her employment at that time. J.A. 55. As grounds for termination, the

letter cited Perich's "insubordination and disruptive behavior on Tuesday, February 22, 2005" and said that Perich had "damaged, beyond repair, [her] working relationship" with Hosanna-Tabor "by threatening to take legal action." *Ibid.* At the meeting on April 10, the congregation voted to rescind Perich's call. None of petitioner's communications with Perich during this period mentioned the Synod's dispute-resolution process or Perich's failure to use it. Perich testified that she was not even aware of that process until petitioner raised it years later in this litigation. See J.A. 228.

3. a. Perich filed a charge with the EEOC alleging discrimination and retaliation in violation of the ADA. Pet. App. 9a. On September 28, 2007, the EEOC filed suit against petitioner, and Perich intervened. *Id.* at 9a-10a; see 42 U.S.C. 12117(a) and 2000e-5(f)(1). Both the EEOC and Perich claimed unlawful retaliation under the ADA; Perich also claimed retaliation in violation of Michigan law. Pet. App. 9a-10a.

The district court granted petitioner's motion for summary judgment, concluding that the ADA retaliation claim was barred by the "ministerial exception," a judge-made exception to the civil rights laws, including the ADA and Title VII. See Pet. App. 41a, 53a. Although the district court noted that "courts remain sharply divided about what positions fit the criteria" for identifying a ministerial employee, *id.* at 43a, the court concluded that Perich was a ministerial employee whose retaliation claim was beyond the court's subject-matter jurisdiction, *id.* at 41a, 50a-53a.

b. The court of appeals vacated the district court's judgment and remanded for further proceedings. Pet. App. 1a-25a. The court noted that, in determining whether an employee is a "ministerial" employee barred

by the exception from litigating employment claims against her religious employer, "this Circuit has instructed courts to look at the function, or 'primary duties' of the employee * * * rather than the fact of ordination." *Id.* at 16a-17a. The court also noted that "the overwhelming majority of courts that have considered the issue have held that parochial school teachers such as Perich, who teach primarily secular subjects, do not classify as ministerial employees for purposes of the exception," *id.* at 17a, and that "when courts have found that teachers classify as ministerial employees for purposes of the exception, those teachers have generally taught primarily religious subjects or had a central role in the spiritual or pastoral mission of the church," *id.* at 18a-19a.

The court of appeals concluded that the district court erred in classifying Perich as a ministerial employee in light of undisputed evidence that: "Perich's employment duties were identical when she was a contract teacher and a called teacher"; "she taught math, language arts, social studies, science, gym, art, and music using secular textbooks" and "seldom introduced religion during secular discussions"; "teachers leading chapel or teaching religion were not required to be called or even Lutheran, and, in fact, at least one teacher was not"; and "activities devoted to religion"—such as religious instruction and prayer—"consumed approximately forty-five minutes of the seven hour school day." Pet. App. 19a-20a.

The court of appeals also noted that petitioner on appeal had "attempted to reframe the underlying dispute from the question of whether [it] fired Perich in violation of the ADA to the question of whether Perich violated church doctrine by not engaging in internal

dispute resolution." Pet. App. 24a. The court of appeals held that a court "would not be precluded from inquiring into whether a doctrinal basis actually motivated [petitioner's] actions." *Id.* at 24a-25a. The court noted in this regard that "the LCMS personnel manual, which includes EEOC policy, and the Governing Manual for Lutheran Schools clearly contemplate that teachers are protected by employment discrimination and contract laws [and] none of the letters that Hosanna-Tabor sent to Perich throughout her termination process reference church doctrine or the LCMS dispute resolution procedures." *Ibid.*

Judge White concurred. Pet. App. 26a-30a. She explained that this case differs from others in which courts found parochial school teachers to be ministerial employees because "there is evidence here that the school itself did not envision its teachers as religious leaders, or as occupying 'ministerial' roles." *Id.* at 29a. Judge White emphasized that petitioner's "teachers are not required to be called or even Lutheran to teach or to lead daily religious activities," and that "the duties of the contract teachers are the same as the duties of the called teachers." *Ibid.*

SUMMARY OF ARGUMENT

1. The ADA, by its plain terms, forbids employers—including religious employers like petitioner—from retaliating against their employees for complaining about or reporting discrimination. The history of the ADA confirms that Congress made a conscious choice to include religious employers within its scope. Although it provided certain defenses for religion-based discrimination in employment, Congress has provided no comparable defense for a religious entity that retaliates

against its employees for invoking their rights under the statute.

2. The only question presented in this case is therefore whether the ADA's anti-retaliation provision is unconstitutional as applied to a religious employer that fires an employee—here, a teacher of secular subjects in a parochial school who also performed religious functions—for asserting her rights under the ADA. The answer to that question is no. Petitioner asserts that a categorical "ministerial exception" to enforcement of the civil rights laws bars the ADA claim at issue in this case. But none of the three constitutional provisions upon which petitioner relies to support its categorical claim of immunity stands as a bar to adjudication of this case.

a. In *Employment Division* v. *Smith*, 494 U.S. 872 (1990), this Court held that the Free Exercise Clause of the First Amendment does not provide a defense to those who violate neutral and generally applicable laws, even when their actions are based on religious belief. See *id.* at 877-878. The ADA is just such a law. It neutrally prohibits both discrimination in employment against those with disabilities and retaliation against those who seek to vindicate their rights. It does not single out for disfavorable treatment any religious organization, activity, or belief. Accordingly, the Free Exercise Clause provides petitioner with no defense to an ADA claim for unlawful retaliation.

Petitioner attempts to avoid *Smith*'s logic by pointing to that decision's citation of older cases concerning church-property disputes, which held that the government may not constitutionally take sides in "controversies over religious authority or dogma." 494 U.S. at 877. None of those church-property cases involved a neutral

statute of general application. As the Court has explained, the church-property cases do not require deference to religious authorities in church-related litigation where, as here, neutral principles of law provide a rule of decision. See *Jones* v. *Wolf*, 443 U.S. 595, 602 (1979).

b. The First Amendment right to expressive association likewise provides no defense to the claim of retaliation in this case. That right is implicated only when the presence of an unwanted person in an expressive association would "affect[] in a significant way the group's ability to advocate public or private viewpoints." *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 648 (2000). There may be cases in which the right to expressive association would defeat an employment-discrimination claim against a religious employer. For example, a challenge to a church's announced practice of ordaining only male ministers would fail because compelled ordination of a woman would be incompatible with such a church's ability to express its religious message that only men are spiritually eligible for such positions. Petitioner, however, fails to demonstrate that dismissal of Perich was necessary to allow it to express any message, much less acknowledge the compelling governmental interest in enforcement of anti-retaliation laws.

c. The Establishment Clause likewise provides no support for a categorical ministerial exception that would bar adjudication of this case. While, under some circumstances, a judicial remedy of reinstatement to ministerial office could pose an entanglement problem under the Establishment Clause, no such problem is presented here. Perich has disclaimed any interest in reinstatement, and it is not clear that such a remedy would even be feasible because the school where she worked has closed. In any event, the court could rein-

state Perich to a non-commissioned contract teaching position without reinstating her to her former ecclesiastical office.

Moreover, reinstatement is not the only, or an automatic, remedy in discrimination and retaliation cases. Plaintiffs may seek purely monetary forms of relief, including damages and attorney's fees, which do not pose the same concerns that reinstatement might. There is accordingly no basis for dismissing the complaint because of constitutional concerns about a subset of the possible remedies that might be available upon a finding of liability. Such concerns can be addressed when and if a remedial proceeding occurs.

The anti-entanglement principle of the Establishment Clause can also bar adjudication of claims that would require a court to take sides in a dispute over religious doctrine. But such concerns are not present in this case. Petitioner has variously contended, on the one hand, that it did retaliate against Perich for threatening to sue but had a religious reason for doing so—her failure to use the church's mandatory dispute-resolution process—and, on the other hand, that it did not retaliate against Perich but instead terminated her because of her "disruptive" attempt to return to work. The district court could adjudicate either defense without entanglement. When an employer admits discrimination or retaliation but asserts a religious reason for its actions, a court can accept the employer's articulation of its religious doctrine while rejecting its defense (under *Smith*) without any entanglement. And cases in which an employer denies retaliation and asserts an alternative religious justification for its actions can proceed, "if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge." *Ohio Civil*

Rights Comm'n v. *Dayton Christian Schs., Inc.*, 477 U.S. 619, 628 (1986).

3. Petitioner's request for a broad exemption to the ADA's neutral and generally applicable anti-retaliation provision, if accepted, would critically undermine the protections of the ADA and a wide variety of other generally applicable laws. The government has a compelling interest in protecting those who come to it with information about possibly illegal conduct. An exemption for religious employers would chill employees' ability to invoke their rights under numerous statutes. The logic of petitioner's position, moreover, could easily be invoked as a justification for violating generally applicable laws forbidding retaliation against witnesses in civil or criminal proceedings. No provision of the Constitution demands that result.

4. The constitutional issues that can arise in litigation between religious entities and their employees are best resolved on a case-by-case basis. There is no basis for adoption of petitioner's overly broad prophylactic rule, which is contrary to this Court's normal method of as-applied constitutional decision-making. Petitioner's rule would result in dismissal of numerous cases raising no constitutional concern and would thus unnecessarily strip many employees of their protections under the civil rights laws. Moreover, a rule like petitioner's that turns on the job responsibilities of the plaintiff presents difficult line-drawing problems and can itself entangle the courts in religious matters. Case-by-case adjudication focusing on the nature of the claim, the employer's defense, and the possible remedies at issue avoids those pitfalls.

If, however, the Court adopts a categorical exemption, it should be limited to those plaintiffs who perform

exclusively religious functions and whose claims concern their entitlement to occupy or retain their ecclesiastical office. Such a rule would limit the exclusion's overbreadth while at the same time covering that small group of employees whose disputes with their employers are most likely to turn on entangling subjective religious questions. That narrow exemption would not cover parochial school teachers, like Perich, who perform a mix of secular and religious functions. Plaintiffs in that category should be able to proceed with their claims, subject to careful trial management by the district courts and appropriate sensitivity to entanglement concerns.

ARGUMENT

I. THE ADA'S ANTI-RETALIATION PROVISION APPLIES TO RELIGIOUS ENTITIES THAT RETALIATE AGAINST THEIR EMPLOYEES FOR OPPOSING DISCRIMINATION

The ADA expressly prohibits retaliation against employees who report or complain about discrimination in the workplace. The text and history of the statute make clear that Congress intended the prohibition against retaliation to apply to religious entities in the same manner that it applies to other, non-religious employers.

The ADA's anti-retaliation provision is framed in broad terms: "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual * * * participated in any manner in an investigation, proceeding, or hearing under [the ADA]." 42 U.S.C. 12203(a). The ADA further provides that "[i]t shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment

of, or on account of his or her having exercised or enjoyed, * * * any right granted or protected by [the ADA]." 42 U.S.C. 12203(b).

As explained above, see pp. 2-3, *supra*, the ADA contains defenses for religious employers alleged to have discriminated against an employee or applicant for employment on the basis of disability. In particular, the statute permits a religious entity to "giv[e] preference in employment to individuals of a particular religion to perform work connected with the carrying on by such [entity] of its activities," 42 U.S.C. 12113(c)(1), and to "require that all applicants and employees conform to the religious tenets of such organization," 42 U.S.C. 12113(c)(2). But the statute contains no provisions permitting religious entities to discriminate on bases other than religion or to retaliate against employees who oppose discrimination. See pp. 2-3 & n.3, *supra*.

In this regard, the ADA is similar to Title VII of the Civil Rights Act of 1964. Title VII provides an exemption to its prohibition on discrimination based on religion for "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on * * * of its activities." 42 U.S.C. 2000e-1(a); see *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327 (1987) (upholding the exemption in Section 2000e-1(a) against an Establishment Clause challenge). Title VII also provides that educational institutions may "hire and employ employees of a particular religion" if the institution is "in whole or in substantial part, owned, supported, controlled, or managed" by a religious entity or if its "curriculum

* * * is directed toward the propagation of a particular religion." 42 U.S.C. 2000e-2(e).

Like the ADA, Title VII does not provide additional exemptions permitting religious employers to discriminate on any basis other than religion. The legislative history indicates that the limitation on available defenses was by conscious design. See *EEOC* v. *Pacific Press Publ'g Ass'n*, 676 F.2d 1272, 1276 (9th Cir. 1982). In 1972, Congress considered an amendment to Title VII that would have categorically provided that the statute "shall not apply to * * * any religious corporation, association, or society." 118 Cong. Rec. 1981. The lead sponsor of the bill pending at the time (which became the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103) opposed the proposed exemption, explaining that "of all the institutions in this country who should be setting the example of equal employment opportunity, of equal opportunity for that matter in all aspects of life, it is America's religious institutions." 118 Cong. Rec. at 1992 (statement of Sen. Williams); see *ibid.* ("I am confident that the Houses of God in this country do not shirk that responsibility[;] nor should we."). The Senate rejected the amendment by a vote of 55-25. *Id.* at 1995.

The ADA's legislative history indicates that the statute's defenses for religious entities were to be interpreted in the same manner as the parallel defenses in Title VII. See, *e.g.*, H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 76-77 (1990). The House report provides an illustrative example:

> [A]ssume that a Mormon organization wishes to hire only Mormons to perform certain jobs. If a person with a disability applies for the job, but is not a Mormon, the organization can refuse to hire him or her.

> However, if two Mormons apply for a job, one with a disability and one without a disability, the organization cannot discriminate against the applicant with the disability because of that person's disability.

Id. at 76; see 29 C.F.R. Pt. 1630, App. § 1630.16(a) (EEOC guidance making same distinction).

The history of the ADA's religious defenses makes clear what is already apparent from the statute's text: Congress considered the application of the statute to religious employers, and rather than exempt them entirely from the statute's prohibitions on discrimination and retaliation, it crafted particular exemptions for certain forms of religion-based discrimination in employment. As in Title VII, these statutory exemptions provide for a substantial accommodation of religious belief and practice. But they do not exempt retaliation. Congress intended the ADA's anti-retaliation provision to apply to religious entities as it applies to other employers. See *Hishon* v. *King & Spalding*, 467 U.S. 69, 77-78 & n.11 (1984) ("When Congress wanted to grant an employer complete immunity [from Title VII], it expressly did so.").[4]

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[4] Although the Fifth Circuit in *McClure* v. *Salvation Army*, 460 F.2d 553, cert. denied, 409 U.S. 896 (1972), concluded that the Congress that enacted Title VII did not intend by the broad wording of the statute "to regulate the employment relationship between church and minister," *id.* at 560-561, courts of appeals have since repeatedly acknowledged that the text and history of the statute clearly manifest Congress's intent to permit claims by all employees of religious entities, subject only to certain exceptions for discrimination on the basis of religion. See, *e.g.*, *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 303 n.4 (3d Cir. 2006), cert. denied, 550 U.S. 903 (2007); *Rayburn* v. *General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1165-1167 (4th Cir. 1985), cert. denied, 478 U.S. 1020 (1986).

II. APPLICATION OF THE ADA'S ANTI-RETALIATION PROVISION IN THIS CASE DOES NOT VIOLATE THE FIRST AMENDMENT

Petitioner does not dispute that the ADA's anti-retaliation provision, by its plain terms, applies in this dispute. It instead cites three separate First Amendment guarantees—the Free Exercise Clause, the right to freedom of association, and the Establishment Clause—in support of a categorical "ministerial exception" that would bar courts from hearing "discrimination claims by employees who carry out important religious functions" (as defined by the religious employers). Pet. Br. 16, 19-37; see also *id.* at 13 (describing the ministerial exception as "prevent[ing] ministers from suing their churches over most employment disputes"). In particular, petitioner urges the Court to adopt a categorical rule that would bar adjudication of any suit—including the ADA retaliation suit at issue in this case—concerning a religious employer's termination of an employee who performs important religious functions. Pet. Br. 50; accord *id.* at 14, 19; see *id.* at 48-49.

This Court, however, has repeatedly made clear that it will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." See *United States* v. *Raines*, 362 U.S. 17, 21 (1960) (internal quotation marks and citation omitted); see also *ibid.* (this Court will not pronounce a statute void as unconstitutional "except as it is called upon to adjudge the legal rights of litigants in actual controversies"). Although significant constitutional questions may arise in other cases concerning the application of the civil rights laws to religious entities, neither the Free Exercise Clause, nor the right to freedom of association, nor the Establishment Clause, stands as an im-

pediment to adjudication of Perich's claim that she was unlawfully terminated from her teaching position for exercising her rights under the ADA. The Free Exercise Clause does not exempt religious entities from the reach of generally applicable laws like the ADA, nor has petitioner made the context-specific showing necessary to establish that the ADA's anti-retaliation provision unconstitutionally interferes with its association rights. And while the Establishment Clause places important limits on the remedies a court may order and the types of questions it may resolve, not every employment dispute between a religious employer and an employee with religious functions risks excessive governmental entanglement in matters of religion, and no such entanglement concerns arise here.

A. The Free Exercise Clause Does Not Bar Application Of The ADA's Anti-Retaliation Provision In This Case

As originally conceived, a categorical ministerial exception to the employment-discrimination laws was thought to be compelled by the Free Exercise Clause of the First Amendment. See *McClure* v. *Salvation Army*, 460 F.2d 553, 558 (5th Cir.) ("Only in rare instances where a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate' is shown can a court uphold state action which imposes even an 'incidental burden' on the free exercise of religion.") (quoting *Sherbert* v. *Verner*, 374 U.S. 398, 403 (1963)), cert. denied, 409 U.S. 896 (1972); accord *Rayburn* v. *General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985) (citing, *inter alia*, *Sherbert*, 374 U.S. at 403), cert. denied, 478 U.S. 1020 (1986). Subsequent decisions of this Court have, however, made clear that the Free Exercise Clause does not

exempt religious entities from generally applicable laws, such as those forbidding discrimination and retaliation in the workplace.

1. The Free Exercise Clause does not forbid application of neutral, generally applicable laws that incidentally burden religious practice

In *Employment Division* v. *Smith*, 494 U.S. 872 (1990), this Court rejected the proposition that the Free Exercise Clause requires the government to make exceptions to neutral laws of general applicability that have the incidental effect of burdening religious practice. See *id.* at 885 (rejecting the balancing test announced in *Sherbert*, *supra*). In *Smith*, two members of the Native American Church had "ingested peyote for sacramental purposes at a ceremony" of the church. 494 U.S. at 874. Yet use of peyote violated generally applicable state law, and the church members were fired from their jobs as a result. *Ibid.* They were then denied unemployment compensation on the ground that they had been discharged for "work-related 'misconduct.'" *Ibid.*

The church members argued that "their religious motivation for using peyote place[d] them beyond the reach of a criminal law that [was] not specifically directed at their religious practice, and that [was] concededly constitutional as applied to those who use the drug for other reasons." *Smith*, 494 U.S. at 878. This Court rejected that contention.

The Court first noted that the "free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires" and that the First Amendment therefore "obviously excludes all 'governmental regulation of religious *beliefs*

as such.'" *Smith*, 494 U.S. at 877 (quoting *Sherbert*, 374 U.S. at 402). The Court explained, however, that when such beliefs involve "the performance of (or abstention from) physical acts," a different analysis is required. *Ibid.* In that setting, the Free Exercise Clause does no more than prohibit the government from prohibiting "such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display." *Ibid.* But where "burdening" or even "*prohibiting* the exercise of religion" "is not the object" of a "generally applicable and otherwise valid provision" but "merely [its] incidental effect," then "the First Amendment has not been offended." *Id.* at 878 (emphasis added).

Like the law at issue in *Smith*, the ADA is neutral and generally applicable: it applies to all employers with more than 15 employees. 42 U.S.C. 12111(5), 12112(a). It does not single out religious organizations for disfavor or interference. To the contrary, the statute provides special solicitude to religious employers by providing them defenses unavailable to secular employers. See 42 U.S.C. 12113(c). Under *Smith*, petitioner cannot claim that the Free Exercise Clause provides it an exemption from the ADA's generally applicable prohibition on retaliation.

2. ***The Free Exercise Clause does not forbid application of neutral, generally applicable employment laws to religious entities***

Petitioner contends that, notwithstanding *Smith*, the Free Exercise Clause confers on religious entities a right "to manage their own internal affairs" and "select their key personnel" without regard to neutral, generally applicable laws (and, moreover, without regard to

the strength of the government's interest in enforcing those laws). Pet. Br. 24. That contention is incorrect.

a. Petitioner emphasizes that the Court in *Smith* reaffirmed the proposition, established in a series of cases concerning disputes over church property, that "[t]he government may not * * * lend its power to one or the other side in controversies over religious authority or dogma," 494 U.S. at 877 (citing *Serbian E. Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church* v. *Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff* v. *Saint Nicholas Cathedral*, 344 U.S. 94 (1952)). In petitioner's view, that statement means that the "government may not take sides in a dispute" between a religious employer and a terminated "employee who performs important religious functions" (as defined by the employer), even when the government is seeking to enforce a neutral, generally applicable law. Pet. Br. 23.

The broad rule petitioner attempts to derive from a single sentence in *Smith* is irreconcilable with the decision itself. First, *Smith* cited the government's "lend[ing] its power to one or the other side in controversies over religious authority or dogma" as an example of an impermissible government attempt to "regulat[e] * * * religious *beliefs* as such." 494 U.S. at 877 (quoting *Sherbert*, 374 U.S. at 402). Accordingly, a court may not choose between competing interpretations of church doctrine because to do so would amount to an attempt to regulate religious belief. But the Court in *Smith* also made clear what the government *can* permissibly do when it enforces a generally applicable law: regulate "the performance of (or abstention from) *physical acts*," even where those acts are religiously grounded and even where the government's regulation would therefore bur-

den religious practice. See *id.* at 877-878 (emphasis added).

Adjudication of this case would not require a court to choose among competing interpretations of Lutheran doctrine or otherwise regulate petitioner's religious belief as such; instead, it involves a "physical act[]" (*Smith*, 494 U.S. at 877)—the dismissal of Perich on grounds made unlawful by the ADA. Indeed, *Smith* made clear that "laws providing for equality of opportunity for the races" are precisely the kind of generally applicable statutes regulating physical acts that pose no free-exercise problem, even when applied to religious entities and even when the entity claims a religious motivation for its actions. *Id.* at 889 (citing *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 603-604 (1983)). So too the ADA, a generally applicable law providing for equality of opportunity for persons with disabilities and for the protection of individuals who speak out about discrimination.

b. Nor do the church-property cases cited in *Smith* support the proposition that "the right of churches to manage their own internal affairs" (Pet. Br. 24) invariably trumps neutral, generally applicable laws. See *EEOC* v. *Catholic Univ. of Am.*, 83 F.3d 455, 463 (D.C. Cir. 1996) (acknowledging that "*Kedroff* and the other Supreme Court cases that we and other courts have cited in support of the ministerial exception did not involve neutral statutes of general application").

Kedroff involved a New York statute that "by its terms * * * transfer[red] the control of the New York churches of the Russian Orthodox religion from the central governing hierarchy of the Russian Orthodox Church, the Patriarch of Moscow and the Holy Synod, to the governing authorities of the Russian Church in

America." 344 U.S. at 107. The statute was neither neutral nor generally applicable; it expressly singled out the Russian Orthodox Church for interference. As the Court explained, the statute "[b]y fiat * * * displace[d] one church administrator with another" and "thus intrude[d] for the benefit of one segment of a church" in violation of the First Amendment. *Id.* at 119.

Petitioner's reliance on *Serbian Eastern Orthodox Diocese* and *Presbyterian Church* is likewise misplaced. Neither involved a church's attempt to exempt itself from a neutral, generally applicable law; instead, those cases "[were] premised on a perceived danger that in resolving intrachurch disputes the State [would] become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs." *General Council on Fin. & Admin., United Methodist Church* v. *California Superior Court*, 439 U.S. 1369, 1373 (1978) (Rehnquist, J., in chambers); see *Serbian E. Orthodox Diocese*, 426 U.S. at 698 (rejecting defrocked bishop's claim that his removal by church authorities was "procedurally and substantively defective under the internal regulations of the Mother Church"); *Presbyterian Church*, 393 U.S. at 449 ("First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice.").[5] Indeed, *Presbyterian Church* emphasized

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[5] *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1872), on which petitioner also relies (*e.g.*, Pet. Br. 25), did not involve any constitutional claim; it held, as a matter of common law, that civil courts should not disturb the ruling of a religious tribunal on a religious matter. See *id.* at 731 ("When a civil right depends upon an ecclesiastical matter, it is the civil court and not the ecclesiastical which is to decide. But the civil tribunal tries the civil right, and no more, taking the ecclesiastical decisions out

that although civil courts cannot "engage in the forbidden process of interpreting and weighing church doctrine" in resolving church property disputes, they can apply "neutral principles of law, developed for use in all property disputes, * * * without 'establishing' churches to which property is awarded." *Id.* at 449, 451.[6]

Any remaining doubt about the meaning of the church-property cases was dispelled by *Jones* v. *Wolf*, 443 U.S. 595 (1979). In that case, a majority of a local congregation voted to withdraw from the Presbyterian Church in the United States, while a minority faction wanted to retain the affiliation. *Id.* at 598. Presbyterian church authorities concluded that "the minority faction constituted the true congregation" of the local church, and the minority faction sought "declaratory and injunctive orders establishing [its] right to exclusive posses-

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of which the civil right arises as it finds them."). At the same time, *Watson* made clear that ecclesiastical bodies could not supplant civil courts on matters of generally applicable law. See *id.* at 733 ("[I]f the General Assembly of the Presbyterian Church should undertake to try one of its members for murder, and punish him with death or imprisonment, its sentence would be of no validity in a civil court or anywhere else.").

[6] *Gonzalez* v. *Roman Catholic Archbishop*, 280 U.S. 1 (1929), upon which petitioner also relies (Pet. Br. 16, 55), is even further afield. That decision involved interpretation of a trust document and presented no question under the First Amendment. *Gonzalez* rejected the Archbishop's contention that "every controversy concerning * * * the right to appointment" to the chaplaincy at issue "was removed from the jurisdiction of secular courts" and entrusted solely to an "ecclesiastical forum." 280 U.S. at 15-16. The question before the Court involved "the terms of [a] trust," and the Archbishop prevailed because the Court found the trust to include "an implied term" that it be "administered" consistent with the rulings of church "tribunals for the determination of ecclesiastical controversies." *Id.* at 16.

sion and use of the * * * church property." *Id.* at 598-599 (internal quotation marks and citation omitted).

The *Jones* Court rejected the contention "that whenever a dispute arises over the ownership of church property, civil courts must defer to the 'authoritative resolution of the dispute within the church itself.'" 443 U.S. at 604-605 (internal citation omitted). Had the Court adopted that rule of automatic deference, it would have directed judgment for the minority faction because church authorities had already declared it the true congregation. The earlier property-dispute cases, the Court explained, merely "prohibit[] civil courts from resolving church property disputes on the basis of religious doctrine and practice." *Id.* at 602. They do not disable courts from deciding such disputes according to "neutral principles of law." *Ibid.*; see *id.* at 604. The First Amendment, the Court held, does not "require[] the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved." *Id.* at 605. The Court thus remanded to the Georgia courts to apply the "neutral-principles approach" to the case, noting that such an inquiry might result in judgment for the majority faction, *id.* at 607-609, even though the ecclesiastical authorities had ruled for the minority.

In discussing the "neutral-principles approach" in *Jones*, the Court made clear that the approach was not limited to disputes over property. As the Court noted, the "neutral-principles approach cannot be said to 'inhibit' the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, *hire employees*, or

purchase goods." *Jones*, 443 U.S. at 606 (emphasis added).

c. Petitioner argues that the ministerial exception "does not present the dangers warned of in *Smith*." Pet. Br. 24 (quoting *Catholic Univ. of Am.*, 83 F.3d at 462). Specifically, petitioner contends that because the exemption is "limited to the right of churches to manage their own internal affairs," it would "not make every individual conscience 'a law unto itself.'" *Ibid.* (quoting *Smith*, 494 U.S. at 890).

It is true that petitioner's conception of the ministerial exemption would not allow a single individual to opt out of a specific law as applied to himself, but it would confer a comparable opt-out power on groups of individuals who form religious organizations. This Court has not adopted that approach. See *Christian Legal Soc'y Chapter of the Univ. of Cal.* v. *Martinez*, 130 S. Ct. 2971, 2995 n.27 (2010) (holding that *Smith* foreclosed religious association's argument that the Free Exercise Clause entitled it to an exemption from an across-the-board policy); cf. *City of Boerne* v. *Flores*, 521 U.S. 507, 544 (1997) (Scalia, J., concurring in part) (affirming that *Smith* applies to a church's claim of exemption from generally applicable zoning laws).

Petitioner also argues that the categorical nature of the ministerial exception avoids "the balancing condemned in *Smith*." Pet. Br. 24. That is hardly a virtue. Petitioner's approach would exempt a religious organization from a neutral, generally applicable law, no matter how compelling the government's countervailing interests and no matter how negligible the burden on a particular religious practice. Even Members of the Court who have criticized the holding of *Smith* have not advocated that type of per se categorical exemption.

See *Smith*, 494 U.S. at 897 (O'Connor, J., concurring in the judgment) ("Respondents, of course, do not contend that their conduct is automatically immune from all governmental regulation simply because it is motivated by their sincere religious beliefs.").

d. To recognize a "right of churches to manage their own internal affairs" (Pet. Br. 24), without regard to generally applicable employment laws, would produce anomalous consequences. Although petitioner claims unfettered discretion to fire a purportedly "ministerial" employee, the logic of petitioner's argument would also presumably confer on religious employers unfettered discretion to *hire* "ministerial" employees of their choice, including, for example, aliens not authorized to work in the United States, see *Intercommunity Ctr. for Justice & Peace* v. *INS*, 910 F.2d 42, 44 (2d Cir. 1990) (rejecting religious organization's free-exercise challenge to prohibition on hiring unauthorized workers), or children, see *Prince* v. *Massachusetts*, 321 U.S. 158, 161, 164, 170 (1944) (rejecting free-exercise challenge to child-labor laws preventing the "preach[ing]" of "the gospel" by an "ordained" child "minister[]"). The Free Exercise Clause confers no such "private right to ignore generally applicable laws." *Smith*, 494 U.S. at 886.

B. Petitioner's First Amendment Right To Freedom Of Association Does Not Require Dismissal

Petitioner also contends (Pet. Br. 33-36) that this Court's cases recognizing a First Amendment right to associate with others for expressive or religious ends provide an "independent" basis for a ministerial exception from the civil rights laws. But like the right of free exercise, the right of association provides no basis for crafting a categorical exemption for religious entities.

1. In its expressive association cases, the Court has recognized that "[t]he forced inclusion of an unwanted person in a group" may infringe the group's First Amendment rights, but only "if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 648 (2000). Although an association's assessment of "what would impair its expression" is entitled to deference, an association may not "erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message." *Id.* at 653. Even when a court finds that compliance with the antidiscrimination laws would impose a significant burden, "the freedom of expressive association, like many freedoms, is not absolute." *Id.* at 648. "[T]he freedom [can] be overridden 'by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Ibid.* (quoting *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623 (1984)).

The principles set forth in these cases provide no support for a categorical, *ex ante* limitation on application of the civil rights laws to all religious employers and employees who perform religious functions. To the contrary, this Court's decisions require careful consideration of a particular group's expression, whether inclusion of the individual in question would significantly impair that expression, and, if so, whether, under all the circumstances, the government's compelling interest should nonetheless prevail. See, *e.g.*, *Dale*, 530 U.S. at 659. Petitioner fails to make any such showing in this case. Indeed, petitioner declines even to consider the

government's compelling interest in preventing retaliation against those who report or speak out about illegal conduct, see Pet. Br. 24-25, much less explain why that interest is insufficient to override any interest petitioner might have in terminating a school teacher for asserting her rights under the ADA.

2. Under different circumstances, a religious employer would be able to successfully invoke a freedom of association defense to application of the civil rights laws. The availability of such a defense provides a full response to petitioner's concern that the operation of generally applicable employment discrimination laws "would prohibit many common religious practices," including, for example, "the all-male clergy among Catholics and Orthodox Jews." Pet. Br. 18. As an initial matter, it is unclear whether Title VII would permit claims challenging such gender-based qualifications because gender could well be considered a bona fide occupational qualification for such positions. See 42 U.S.C. 2000e-2(e)(1); *Dothard* v. *Rawlinson*, 433 U.S. 321, 332-337 (1977). But assuming *arguendo* that the statute otherwise permitted such claims, religious employers could defend against them on the ground that compelled ordination of women would be impossible to square with their religious view that only men should occupy such roles. In light of the deeply embedded and long-standing nature of such ecclesiastical rules, the government interest in enforcement of anti-discrimination laws would necessarily give way. Cf. *Dale*, 530 U.S. at 656-659 (state interest not sufficiently compelling to outweigh Boy Scouts' right to shape message on homosexuality); see also *Smith*, 494 U.S. at 882 ("[I]t is easy to envision a case in which a challenge on freedom of asso-

ciation grounds would likewise be reinforced by Free Exercise Clause concerns.").

But the fact that the First Amendment association right forbids certain applications of the anti-discrimination laws to religious entities does not mean that it must forbid them all. The right of association poses no bar to adjudication of this case.

C. The Establishment Clause Does Not Require Dismissal

Finally, petitioner contends that the "ministerial exception is also, and independently, grounded in the Establishment Clause." Pet. Br. 26. It argues that "[t]he Establishment Clause imposes two important limits on the power of government to interfere in religious organizations: government cannot appoint ministers; and government cannot entangle itself in religious questions." *Ibid.* These two Establishment Clause limits form the foundation of the rule petitioner ultimately asks this Court to adopt: a rule that would bar adjudication of claims by "ministerial" employees when the dispute "could impose an unwanted minister on a church or would entangle the government in religious questions." *Id.* at 50.

That particular formulation of the ministerial exception does not threaten to invalidate the broad swath of statutory applications that a rule "prevent[ing] ministers from suing their churches over most employment disputes" would. Pet. Br. 13. But petitioner's narrower formulation is nevertheless overbroad, sweeping in a substantial number of cases—like this one—that raise no constitutional concerns about governmental appointment of ministers or entanglement in matters of religious doctrine.

1. This case does not present the question of reinstatement to a ministerial office

Petitioner contends that "[p]erhaps the most fundamental problem with discrimination suits by ministers is that when successful, they end in reinstatement." Pet. Br. 26. Petitioner is correct that reinstatement may pose entanglement concerns insofar as it entails actual "government appointment of [a] minister[] over the objections of [a] church[]." *Id.* at 28. But the theoretical availability of such relief does not justify barring adjudication of respondents' retaliation claim in this case, for three reasons.

First, reinstatement may not be feasible in this case because, as petitioner now informs the Court, its school has closed. Pet. Br. 3 n.1; cf. Pet. 2. Perich is not, in any event, seeking reinstatement. See Perich Brief. Accordingly, this case does not present the question whether such a remedy would be constitutional.

Second, an order to reinstate Perich would not necessarily require "reinstatement to her ecclesiastical office." Pet. Br. 15. The school employed contract teachers who performed the same duties as "called" teachers, Pet. App. 5a; on occasion, "called" teachers asked to assume contract status, J.A. 71; and Perich herself previously served in a contract position. Unless non-Lutheran contract teachers, too, are to be considered "ministers," reinstating Perich to such a position would raise no Establishment Clause concerns.[7]

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[7] Petitioner argues (Pet Br. 39-40) that lay contract teachers at the school performed important religious functions, even though they were not required to be called or even Lutheran. It is unclear whether petitioner means to suggest that reinstatement of lay teachers to their teaching positions would raise the same Establishment Clause concerns as reinstating a commissioned minister to that ecclesiastical office.

Third, and most fundamentally, reinstatement is not the only remedy in discrimination or retaliation cases, nor is it a remedy to which successful plaintiffs are automatically entitled. See *Pollard* v. *E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 846 (2001). The theoretical availability of a reinstatement remedy therefore provides no grounds for dismissing a complaint that seeks other forms of relief.

Purely monetary relief, for example, does not pose the same risk of entanglement that an order of reinstatement might. Religious organizations are not generally immune from lawsuits, including suits for negligent hiring of clergy, see, *e.g.*, *Malicki* v. *Doe*, 814 So. 2d 347, 364 (Fla. 2002) (First Amendment did not bar a suit for negligent hiring of a minister accused of sexual assault), so religious institutions already must make employment decisions with potential monetary liability in mind. Thus, "it cannot be that the First Amendment prohibits suits simply because they have the potential to affect (or 'regulate') churches' hiring and firing decisions." *Elvig* v. *Calvin Presbyterian Church*, 397 F.3d 790, 792 (9th Cir. 2005) (W. Fletcher, J., concurring in the denial of rehearing en banc); see *id.* at 795 (Kozinski, J., concurring in the denial of rehearing en banc) ("Suits by parishioners or non-ministerial employees resting on generally applicable law are just as likely * * * if not more likely * * * to affect the incentives to hire, fire and supervise ministers as suits by clergy.").

In an analogous setting, this Court distinguished between the burden on a religious practice posed by a monetary penalty and that which could be posed by more intrusive forms of relief. In *Bob Jones University*, the Court recognized that "[d]enial of tax benefits" to discriminatory private religious schools would "inevita-

bly have a substantial impact on [their] operation" but nonetheless rejected religion-clause challenges to that denial. 461 U.S. at 603-604. Schools that wished to persist in their practices could do so; a regulatory regime merely making that course of action more expensive did not "prevent [them] from observing their religious tenets." *Id.* at 604. So too here. Monetary relief—even relief in the form of back and front pay—is categorically different in effect from an order reinstating an employee to ordained or commissioned office. Cf. *Minker* v. *Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1360 (D.C. Cir. 1990) ("remedy * * * limited to the award of money damages" in breach-of-contract action provided "no potential for distortion of church appointment decisions").

Even if back and front pay were properly considered the "monetary equivalent of reinstatement," as petitioner contends (Pet. Br. 51), both the EEOC and Perich also seek money damages for pecuniary and non-pecuniary losses, as well as attorney's fees. See J.A. 17-18; Pet. App. 73a-74a; see also 42 U.S.C. 1981a(a)(2); *Pollard*, 532 U.S. at 854. This case thus falls outside petitioner's articulation of its own rule: this is not a case that will inevitably "end in reinstatement or * * * back pay and front pay." Pet. Br. 14. Establishment Clause concerns about the remedies available to Perich, should respondents succeed in proving their retaliation claim, provide no basis for refusing to hear the claim altogether.

2. This case does not pose a risk of entanglement on any question of religious doctrine

Petitioner also argues that adjudication of this case would inevitably "entangle the courts in religious ques-

tions." Pet. Br. 52. That argument, too, provides no basis for dismissing this suit at the very outset. Some employment discrimination disputes could present a problem of "excessive" government entanglement with religion, see *Agostini* v. *Felton*, 521 U.S. 203, 233 (1997), if those disputes required a court to take sides in a dispute over religious doctrine. See, *e.g.*, *Serbian E. Orthodox Diocese*, 426 U.S. at 713 ("[R]eligious controversies are not the proper subject of civil court inquiry."). That is not, however, true of every case in which an employee who performs religious functions challenges her termination as unlawful, and it is not true of this case.

a. Most obviously, there is no danger of entanglement when the religious employer proffers no religious reason for the employee's termination. For example, had Perich been dismissed on the stated ground that her class's scores on standardized math tests were subpar, Perich might attempt to show that this reason was pretextual, and that the real reason for her dismissal was illegal retaliation. Such a case would be litigated just like any employment discrimination case involving a non-religious organization and would pose no risk of entanglement on any matter of religious doctrine. See *Rweyemamu* v. *Cote*, 520 F.3d 198, 208 (2d Cir. 2008) ("[H]owever high in the church hierarchy he may be, a plaintiff alleging particular wrongs by the church that are wholly non-religious in character is surely not forbidden his day in court.").[8]

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[8] The same analysis would apply in a sexual-harassment case where, as typically occurs, the employer does not suggest that the harassment alleged was religiously motivated but will instead deny that the harassment took place. See *Bollard* v. *California Province of the Soc'y of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999) (permitting sexual-harassment suit against religious employer to proceed; "The Jesuits do not offer a

Petitioner counters that, "when the employee was performing important religious functions for a church, the employer's proffered legitimate reasons are nearly always religious." Pet. Br. 29 (citing *Tomic* v. *Catholic Diocese of Peoria*, 442 F.3d 1036, 1040 (7th Cir.), cert. denied, 549 U.S. 881 (2006)). It is not clear why that would be true as an empirical matter, particularly where the employee also performs non-religious duties. In any event, petitioner's predictive judgment about the types of reasons religious employers are likely to offer does not provide a constitutional basis for relieving employers of the task of offering *any* reason at all. See Pet. Br. 24 (citing, with apparent approval, the "dominant understanding of the ministerial exception in the courts of appeals" that the exception applies regardless of the employer's reasons).

b. Merely proffering a religious reason for terminating an employee does not, moreover, invariably raise entanglement concerns. For example, when a religious employer acknowledges that it retaliated against an employee but claims it did so for a religious reason, there is no risk of entanglement. The court will not have to evaluate church doctrine, assess the centrality of the employer's religious belief, or "resolve a theological dispute" (Pet. Br. 29) in order to adjudicate the case. The court can accept the employer's articulation of its religious reasons for retaliation but nevertheless conclude that the employer is bound by *Smith* to follow generally applicable prohibitions on such conduct. *Smith* itself, which rejected church members' religious defense to the application of neutral, generally applica-

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religious justification for the harassment [the plaintiff] alleges; indeed, they condemn it as inconsistent with their values and beliefs.").

ble law, demonstrates that resolving such a case raises no danger of excessive entanglement.[9]

c. In other cases, the employer may deny any motive to discriminate or retaliate, but argue that it acted for an alternative religious reason, *e.g.*, because the employee had violated the tenets of the faith. The plaintiff may respond by arguing that the religious reason was pretextual (without disputing the employer's interpretation of religious doctrine or gainsaying the centrality of the tenet at issue). This Court's decision in *Ohio Civil Rights Commission* v. *Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986) (*Dayton Christian Schools*), demonstrates that such cases, too, may proceed.

The respondent in *Dayton Christian Schools* was a school that was an "extension of the Christian education ministries of * * * two churches." 477 U.S. at 622. The school professed a "belief in the internal resolution of disputes through the 'Biblical chain of command'" and that "one Christian should not take another Christian into courts of the State." *Id.* at 622-623. After a female teacher informed the school that she was pregnant, she was told her contract would not be renewed because of the school's "religious doctrine that mothers should stay home with their preschool age children." *Id.*

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[9] Similarly, no entanglement problem is posed by testing, as a factual matter, the sincerity of a party's professed religious belief. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 725 n.13 (2005); *Hernandez* v. *Commissioner*, 490 U.S. 680, 693 (1989) ("[U]nder the First Amendment, the IRS can reject otherwise valid claims of religious benefit only on the ground that a taxpayers' alleged beliefs are not sincerely held, but not on the ground that such beliefs are inherently irreligious."); *United States* v. *Seeger*, 380 U.S. 163, 185 (1965) ("[W]e hasten to emphasize that while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case.").

at 623. The teacher threatened to sue for sex discrimination. She was then suspended and terminated on the stated ground that she had violated the church's mandatory internal dispute-resolution procedure. *Ibid.*

The teacher filed a complaint with the Ohio Civil Rights Commission alleging that the non-renewal decision constituted sex discrimination and that her termination constituted unlawful retaliation. The school filed an action in federal district court "seeking a permanent injunction against the state proceedings on the ground that any investigation of [its] hiring process or any imposition of sanctions for [the school's] nonrenewal or termination decisions would violate the Religion Clauses of the First Amendment." *Dayton Christian Schools*, 477 U.S. at 624-625. The court of appeals reversed the district court's decision denying the injunction, "holding that the [state agency's] exercise of * * * jurisdiction would violate both the Free Exercise Clause and the Establishment Clause of the First Amendment." *Id.* at 625.

This Court reversed, noting that "[e]ven religious schools cannot claim to be wholly free from some state regulation." *Dayton Christian Schools*, 477 U.S. at 628. The Court concluded that "however [the school's] constitutional claim should be decided on the merits, the [Ohio] Commission violates no constitutional rights by merely investigating the circumstances of [the teacher's] discharge in this case, *if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge.*" *Ibid.* (emphasis added). Although Justice Stevens, writing for himself and three other Justices, concurred in the judgment, the Court was unanimous on this point. See *id.* at 632 (Stevens, J., concurring in the judgment).

The decision in *Dayton Christian Schools* refutes petitioner's suggestion that, under *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979), the very "process of inquiry" in "religious employment discrimination cases" is impermissibly entangling. Pet. Br. 31 (internal citation omitted). The court of appeals in *Dayton Christian Schools* had embraced the very same argument, see *Dayton Christian Schs., Inc.* v. *Ohio Civil Rights Comm'n*, 766 F.2d 932, 959-960 (6th Cir. 1985) (citing *Catholic Bishop*, 440 U.S. at 502-503), rev'd, 477 U.S. 619, and this Court rejected it.[10]

d. Cases in which the religious employer offers a reason relating to an evaluation of the plaintiff's performance of religious functions for an adverse action pose the greatest risk for entanglement. If, for example, petitioner in this case had claimed it fired Perich because she was insufficiently spiritual, it would be constitution-

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[10] In *Catholic Bishop*, this Court construed the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, not to apply to teachers in church-operated schools, in order to avoid potential entanglement problems that would arise if the NLRB were found to have jurisdiction. 440 U.S. at 502, 504-507. The Court explained that "[t]he Board will be called upon to decide what are 'terms and conditions of employment' and therefore mandatory subjects of bargaining," *id.* at 502-503—a category that includes "nearly everything that goes on in the schools," including both secular and religious matters. *Id.* at 503. Such ongoing, comprehensive oversight of a religious institution by a government agency raises entanglement concerns of a sort that a carefully circumscribed, backward-looking inquiry into the basis for a single employment action does not. See *Geary* v. *Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 328 (3d Cir. 1993); see also *Pacific Press Publ'g Ass'n*, 676 F.2d at 1282 ("The present case is distinguishable from *NLRB* v. *Catholic Bishop* because neither the judgment in this suit nor Title VII's enforcement mechanisms result in any ongoing scrutiny of Press' operations."); *Hankins* v. *Lyght*, 441 F.3d 96, 116 (2d Cir. 2006) (Sotomayor, J., dissenting).

ally problematic for Perich to challenge that assessment in precisely the same way that an employee of a non-religious employer might attempt to challenge a comparable subjective defense in a secular setting, *e.g.*, that she was insufficiently professional. By contending that she was in fact just as spiritual or more spiritual than other teachers, Perich's claim would risk entangling the court in religious questions beyond its adjudicative capacity.

In such cases, the district court could limit the pretext inquiry to cordon off challenges to the religious organization's religious assessment. If plaintiff's only pretext evidence consisted of a challenge to that assessment, then the suit might have to be dismissed altogether. See *Rweyemamu*, 520 F.3d at 200, 209 (affirming dismissal of complaint brought by priest where stated grounds for dismissal were his "insufficient[] devot[ion] to ministry" and poor homilies).

e. Petitioner in this case has variously contended on the one hand that it did retaliate against Perich for threatening to sue but had a religious reason for doing so—her failure to use the church's mandatory dispute-resolution process—and, on the other hand, that it did not retaliate against Perich but instead terminated her because of her "disruptive" attempt to return to work. The district court could adjudicate both these defenses without entanglement.

Petitioner's proffered reasons do not call upon the district court to evaluate Perich's spiritual "gifts and graces." *Rweyemamu*, 520 F.3d at 209 (internal quotation marks and citation omitted). Nor does petitioner's invocation of Lutheran teaching necessarily invite the district court to evaluate whether "Lutherans really believe in non-litigious, internal resolution of disputes over

fitness for ministry," based on the testimony of warring Lutheran theological experts. Pet. Br. 56-57.

Much as in *Dayton Christian Schools*, the district court can inquire into whether petitioner's proffered doctrinal reason for terminating Perich actually motivated its actions without questioning the validity of the doctrine. See Pet. App. 24a; *ibid.* (noting that "none of the letters that [petitioner] sent to Perich throughout her termination process reference church doctrine or the LCMS dispute resolution procedures"); see also *Geary* v. *Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 329 (3d Cir. 1993) (First Amendment did not preclude the court from "determin[ing] whether the religious reason stated by [the school] actually motivated the dismissal"); *DeMarco* v. *Holy Cross High Sch.*, 4 F.3d 166, 171 (2d Cir. 1993) (court can conduct an "inquiry * * * [into] whether the articulated purpose is the actual purpose for the challenged employment-related action" without "calling into question the value or truthfulness of religious doctrine"). Moreover, even were the district court to conclude that petitioner retaliated against Perich for religious reasons, the court could conclude that those reasons must yield to the ADA's across-the-board prohibition on such reprisals. There is, in short, no basis to conclude that adjudication of this case will inevitably result in excessive governmental entanglement in matters of religious doctrine.

III. RELIGIOUS EMPLOYERS, LIKE OTHER EMPLOYERS, CANNOT BE PERMITTED TO RETALIATE AGAINST EMPLOYEES WHO REPORT ILLEGAL CONDUCT TO THE GOVERNMENT

If accepted, petitioner's request for an exemption from the generally applicable prohibitions of the ADA's

anti-retaliation provision would critically undermine the protections of the ADA and other generally applicable laws.

A. When an employee files a complaint with the EEOC, she does so "not only [to] redress[] [her] own injury but also [to] vindicate[] the important congressional policy against discriminatory employment practices." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). The "primary purpose" of anti-retaliation provisions of the ADA, Title VII, and other similar statutes is to ensure "unfettered access to statutory remedial mechanisms" as a means of furthering the compelling interest in eliminating discrimination in the workplace. *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997); see *Crawford* v. *Metropolitan Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846, 852 (2009) ("If it were clear law that an employee who reported discrimination * * * could be penalized with no remedy, prudent employees would have a good reason to keep quiet."). Accordingly, "[t]o permit [religious employers] to retaliate against employees who challenge discrimination through EEOC procedures would defeat Congress' intention to protect employees of religious employers. The effect would be to withdraw [the ADA's] protections." *Pacific Press Publ'g Ass'n*, 676 F.2d at 1280; see *id.* at 1281.

B. Petitioner purports to define the scope of its ministerial exception so as to preserve some statutory protections for employees who qualify as ministers. Pet. Br. 14, 50. But those protections would become hollow guarantees if such employees could be terminated any time they complained about their employer's failure to comply. For example, in *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290 (1985) (*Alamo*),

this Court held that there was no constitutional impediment to applying the minimum wage and overtime requirements of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, to employees of a religious foundation's commercial operations, *Alamo*, 471 U.S. at 294 n.6, 303-306, and the Fourth Circuit reached the same conclusion with respect to teachers at church-operated schools, see *Dole* v. *Shenandoah Baptist Church*, 899 F.2d 1389, 1395, 1397-1399, cert. denied, 498 U.S. 846 (1990). If, after these decisions, an employee who had been wrongfully denied the minimum wage filed a complaint with civil authorities to recover the shortfall from a religious employer, federal law would ordinarily protect the employee from retaliation for having filed such a complaint. See 29 U.S.C. 215(a)(3). On petitioner's view, however, the employer would be able to terminate the complaining employee without penalty if she was "ministerial."

Permitting religious employers to retaliate against "ministerial" employees would produce other similarly anomalous effects. For example, petitioner's proposed rule would not bar a suit brought under the Equal Pay Act of 1963, 29 U.S.C. 206, by a female "ministerial" employee paid less than a man because, as a current employee, she would not be seeking reinstatement.[11] See Pet. Br. 14; see also *Shenandoah Baptist Church*, 899 F.2d at 1397-1399 (Equal Pay Act applicable to church-run school). Yet, on petitioner's view, as soon as that employee filed a complaint for the Equal Pay Act violation, see, *e.g.*, *EEOC* v. *Fremont Christian Sch.*, 781 F.2d 1362, 1365 (9th Cir. 1986), the employer could

[11] It is possible, however, that petitioner would view even this suit as barred on entanglement grounds if the employer asserted a religious reason for paying women less than men. See Pet. Br. 52-54.

fire her in response, and she would have no cause of action for retaliation, see 29 U.S.C. 215(a)(3). Likewise, a present employee with a disability could sue because of her employer's failure to provide a reasonable accommodation, see 42 U.S.C. 12112(b)(5)(A), but would have no protection if her employer fired her in retaliation, see 42 U.S.C. 12203. A present employee could complain about a recognized workplace hazard "causing or * * * likely to cause death or serious physical harm," 29 U.S.C. 654(a); see 29 C.F.R. 1975.4(c)(1) (religious schools are employers for purposes of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* (OSHA)), but could be terminated for doing so, see 29 U.S.C. 660(c) (prohibiting retaliation against employees who file complaints regarding OSHA violations). A present employee could seek money damages for "emotional distress and reputational harm caused by * * * sexual harassment," *Elvig* v. *Calvin Presbyterian Church*, 375 F.3d 951, 966 (9th Cir. 2004), but could be fired the moment she filed such a complaint, see 42 U.S.C. 2000e-3(a).

C. Petitioner's proposed rule would chill reporting of unlawful workplace conditions by "ministerial" and "non-ministerial" employees alike. Because the test petitioner proposes for determining whether an employee is ministerial is indeterminate, employees of religious employers often will not know in advance whether they would be considered a ministerial employee or not. The employment discrimination laws would not ordinarily require an employee to guess correctly about eligibility for relief before complaining, nor would they permit the employer to defend against a retaliation suit by contending that the employee's underlying complaint of discrimination lacked merit. See *Pettway* v. *American Cast*

Iron Pipe Co., 411 F.2d 998, 1007 (5th Cir. 1969) ("The employer may not take it on itself to determine the correctness" of employee's complaint.); *Wallace* v. *DTG Operations, Inc.*, 442 F.3d 1112, 1118 (8th Cir. 2006) ("In general, as long as a plaintiff had a reasonable, good faith belief that there were grounds for a claim of discrimination * * * the success or failure of a retaliation claim is analytically divorced from the merits of the underlying discrimination * * * claim."). Yet, under petitioner's view, the employer could immediately dismiss such a complaining employee and face no liability if she were ultimately deemed ministerial; the price of the employee's having guessed wrong on that question at the outset would be her job. In this case, for example, Perich's view that she was not ministerial was at the least reasonable: the EEOC and three judges of the courts of appeals agreed with her. Pet. App. 19a-23a, 29a-30a. Yet, under petitioner's view, it may fire Perich for having invoked rights she reasonably believed she possessed under the ADA. As one of petitioner's amici allows, such a rule would create a substantial incentive for all employees to remain quiet about their employers' unlawful practices. American Jewish Comm. Amicus Br. 21-22 ("Allowing retaliation claims despite a claimant's ministerial status would serve the important function of minimizing the chilling effect that an absolute ministerial exception would have on arguably ministerial employees—or even clearly non-ministerial employees—from asserting their statutory rights to report or complain of discrimination both to their employers and to outside enforcement agencies.").

D. Finally, the logic of petitioner's position threatens to impair both court proceedings and government investigations of unlawful conduct in a variety of circum-

stances involving religious organizations. Petitioner justifies terminating Perich on the ground that she violated its tenet that "fellow believers generally should not sue one another in secular courts." Pet. Br. 54. A different religious entity might similarly invoke its teachings to forbid its employees from testifying in a civil lawsuit between other church members, or from reporting other members' criminal misconduct to civil authorities, or from testifying against other members before a grand jury or in a criminal trial. If petitioner's religious reason for retaliating against Perich suffices to excuse petitioner from complying with the ADA's anti-retaliation provision, it is not clear why other religious organizations could not similarly justify their noncompliance with laws forbidding retaliation against witnesses in criminal investigations and other proceedings. See *Haddle* v. *Garrison*, 525 U.S. 121 (1998) (42 U.S.C. 1985(2) provides cause of action to employee terminated in retaliation for participation in grand-jury proceedings); 18 U.S.C. 1513(e) (Supp. I 2007) (federal offense to "knowingly, with the intent to retaliate, take[] any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense"); 18 U.S.C. 1512(b) (Supp. I 2007) (offense to "use[] intimidation * * * with intent to * * * induce any person to * * * withhold testimony * * * from an official proceeding"); *United States* v. *Craft*, 478 F.3d 899, 900-901 (8th Cir. 2007) (affirming 18 U.S.C. 1512(b) conviction against employer who threatened to dismiss employee if he provided incriminating information to investigators). No provision of the Constitution demands that result.

IV. THE COURT SHOULD ADDRESS CONSTITUTIONAL ISSUES RAISED BY APPLICATION OF CIVIL RIGHTS LAWS TO RELIGIOUS EMPLOYERS AS THEY ARISE, RATHER THAN BY CRAFTING A BROAD PROPHYLACTIC RULE

Because there is no constitutional impediment to adjudication of this lawsuit, there is no valid basis for reversing the court of appeals' judgment that the suit should be permitted to proceed. To the extent that petitioner suggests that the Court should nevertheless resolve this case by crafting a broad prophylactic rule that would require dismissing some or all suits brought by "ministerial" employees at the outset, the Court should reject that suggestion.

A. "It is neither [this Court's] obligation nor within [its] traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop." *Gonzales* v. *Carhart*, 550 U.S. 124, 168 (2007). For this reason, "[a]s-applied challenges are the basic building blocks of constitutional adjudication." *Id.* at 168 (quoting Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1328 (2000)). As explained above, there is no constitutional impediment to allowing this case to proceed. Nor is there any reason to resolve the case by crafting a broad prophylactic exception to the civil rights laws that would bar more applications of those laws than the Constitution demands.

B. Any prophylactic rule that turns on whether the plaintiff qualifies as "ministerial" would inevitably bar the adjudication of claims that raise no constitutional concerns, and for that reason would be substantially overbroad. See pp. 36-40, *supra*; see *Rweyemamu*, 520 F.3d at 208. Moreover, as the cases demonstrate,

any such rule would itself require difficult line-drawing. See *ibid.* (acknowledging that "[c]ircuit courts applying the ministerial exception have consistently struggled to decide whether or not a particular employee is functionally a 'minister.'"). The predominant test employed by the courts of appeals, which requires an assessment of whether an employee's duties are sufficiently religious to qualify her for the ministerial exception, may itself raise entanglement concerns. See *Elvig*, 397 F.3d at 797 (Kozinski, J., concurring in denial of rehearing en banc) ("The very invocation of the ministerial exception requires us to engage in entanglement with a vengeance.").

Petitioner recognizes this difficulty, but its solution is to require courts to defer to a religious employer's position on the religious significance of an employee's duties (unless the position is a "sham"). Pet. Br. 49. Yet experience shows that religious employers invoking the ministerial exception as a defense in employment discrimination lawsuits often take a very broad view of which employees qualify as "ministers." See, *e.g.*, *EEOC* v. *Southwestern Baptist Theological Seminary*, 651 F.2d 277, 283 (5th Cir. 1981) (rejecting seminary's contention that "*all* its employees," including "support staff," "serve a ministerial function") (emphasis added), cert. denied, 456 U.S. 905 (1982). To lend near-dispositive weight to a religious employer's characterizations could well result in unnecessarily depriving large numbers of employees of the statutory protections Congress intended to afford them.

Petitioner's proposal to add certain claim-based limitations (Pet. Br. 14, 19, 50) to the inquiry into the plaintiff's job duties does not cure these difficulties. Nor, for the reasons explained above, see pp. 36-40, *supra*, do

those claim-based limitations effectively cabin the reach of the ministerial exception to cases in which adjudication of employment disputes would violate the First Amendment. Petitioner's rule depends on a series of generalizations and predictive judgments—that discrimination suits like this one "*could* impose an unwanted minister on a church," Pet. Br. 50 (emphasis added), or that an employer will "*nearly always*" proffer inherently entangling religious reasons for terminating a ministerial employee, *id.* at 29 (emphasis added)—that do not apply categorically and thus do not justify a categorical rule that could require dismissing this suit, and others like it, at the very threshold.

C. The First Amendment unquestionably places important constraints on the manner in which disputes against religious entities are litigated. See pp. 31-32, 33, 40-41, *supra*. But to evaluate whether those constraints preclude adjudication of a dispute, the focus should be on the nature of the plaintiff's claim, the employer's defenses, and the appropriateness of various remedies, not the job responsibilities of the plaintiff. If it appears that a case will require the court to interpret church doctrine or resolve a dispute over religious matters, then the entanglement principle of the Establishment Clause should generally require dismissal. See *Minker*, 894 F.2d at 1360 (declining to dismiss minister's breach-of-contract claim against church but stating that district court should grant summary judgment to church if it "turn[s] out that in attempting to prove his case, [the minister] will be forced to inquire into matters of ecclesiastical policy"). Courts must also examine remedies to ensure that they do not impermissibly entangle the government in inherently religious matters. But in a case

(like this one) where entanglement problems can be avoided, there is no basis for dismissal at the threshold.

D. Were this Court nevertheless to decide to craft a prophylactic categorical exemption to the civil rights laws, that exemption should be narrowly tailored so as to disturb no more than necessary the judgment of the political Branches about the appropriate scope of those laws. See *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936). Any such exemption accordingly should be limited to those employees who perform exclusively religious functions, *i.e.*, those employees whose positions have no secular equivalent and whose claims concern their entitlement to occupy or retain their ecclesiastical office.

Such a limited rule is most consistent with the church-property cases on which petitioner principally relies. See pp. 24-26, *supra*. The Court's references to religious personnel in those cases were to "clergy," *Kedroff*, 344 U.S. at 116; a bishop, *Serbian E. Orthodox Diocese*, 426 U.S. at 708; and a chaplain, *Gonzalez* v. *Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929). None of those cases involved personnel with a mix of religious and secular duties, such as Perich. And it is those employees performing exclusively religious functions whose disputes with their employers are most likely to involve subjective judgments about spiritual qualifications that courts are ill-equipped to resolve. See p. 41, *supra*; *Hankins* v. *Lyght*, 441 F.3d 96, 117 (2d Cir. 2006) (Sotomayor, J., dissenting) (ministerial exception covers employment disputes involving "spiritual leaders," but not parochial school teacher with "some religious duties"). In contrast, when employees' duties mix the secular and religious, there is no basis for applying a categorical exemption. Churches have less claim to unfet-

tered discretion over employees performing duties that resemble those performed by employees of secular organizations, and disputes between such employees and their employers are less likely to be of a religious nature.

A ministerial exception applied to teachers in religious schools, like Perich, would be particularly unwarranted because those employees perform a public function: like teachers in public schools, they offer a service necessary to satisfy state compulsory education laws. "[T]his Court has long recognized that religious schools pursue two goals, religious instruction and secular education." *Board of Educ.* v. *Allen*, 392 U.S. 236, 245 (1968). Accordingly, "a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction." *Id.* at 245-246.[12] "[I]f the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in

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[12] In order to satisfy Michigan's compulsory-education law, the subjects taught by private religious schools must be "comparable to those taught in the public schools," Mich. Comp. Laws Ann. § 380.1561(3)(a) (West 2006). Michigan law provides that "[n]o person shall teach or give instruction in any of the regular or elementary grade studies in any private, denominational or parochial school within this state who does not hold a certificate such as would qualify him or her to teach in like grades of the public schools of the state." *Id.* § 388.553; see *Sheridan Road Baptist Church* v. *Department of Educ.*, 348 N.W.2d 263 (Mich. Ct. App. 1984) (rejecting religion-clause challenge to state teacher-certification requirements as applied to parochial school teachers), aff'd, 396 N.W.2d 373 (Mich. 1986), cert. denied, 481 U.S. 1050 (1987).

which those schools perform their secular educational function." *Id.* at 247.

One part of that recognized state interest in religious schools' secular functions is ensuring that they do not discriminate against their employees. Cf. *Bob Jones Univ.*, 461 U.S. at 604 & n.29 (holding that "the Government has a fundamental, overriding interest in eradicating racial discrimination in education" and emphasizing that "[w]e deal here only with religious *schools*—not with churches or other *purely religious* institutions") (second emphasis added). Consistent with this principle, "the overwhelming majority of courts that have considered the issue have held that parochial school teachers such as Perich, who teach primarily secular subjects, do not classify as ministerial employees for purposes of the exception." Pet. App. 17a-18a (citing cases).

That is not to say that lawsuits involving such mixed-duty employees will never raise constitutional questions. Those questions should, however, be addressed when and if they arise. The mere prospect that constitutional questions may arise in some such cases is an insufficient reason to bar those lawsuits from the very outset, thereby categorically depriving Perich and others like her of the protections Congress intended to afford them.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX[1]

1. The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. 42 U.S.C. 2000e provides in pertinent part:

> **Definitions**
>
> For the purposes of this subchapter—
>
> (a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.
>
> * * * * *

[1] The text is from the 2006 edition of the United States Code.

3. 42 U.S.C. 2000e-5 provides in pertinent part:

Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management

committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

* * * * *

(e) **Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system**

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

* * * * *

(f) **Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and deter-**

mine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney

General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order grant-

ing preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate

a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) **Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders**

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a

union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

* * * * *

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

4. 42 U.S.C. 12111 provides in pertinent part:

Definitions

* * * * *

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

* * * * *

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include—

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26.

* * * * *

(7) Person, etc.

The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

* * * * *

5. 42 U.S.C. 12112 provides in pertinent part:

Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

* * * * *

6. 42 U.S.C. 12113 provides in pertinent part:

Defenses

* * * * *

(c) Religious entities

(1) In general

This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Religious tenets requirement

Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

* * * * *

7. 42 U.S.C. 12117 provides in pertinent part:

Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provi-

sion of this chapter, or regulations promulgated under section 12116 of this title, concerning employment

* * * * *

8. 42 U.S.C. 12203 provides:

Prohibition against retaliation and coercion

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(c) Remedies and procedures

The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b) of this section, with respect to subchapter I, subchapter II and subchapter III of this chapter, respectively.

RESPONDENT'S BRIEF

AND
BRIEFS

AUG 2 - 2011
OFFICE OF THE CLERK

No. 10-553

IN THE
Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND CHERYL PERICH,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT CHERYL PERICH

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QUESTION PRESENTED

Whether the anti-retaliation prohibition of the Americans with Disabilities Act (ADA) may be constitutionally applied to a religious association's retaliatory firing of a teacher of secular subjects in a commercially operated school, where the teacher also performs religious functions and is designated a commissioned minister.

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STATEMENT OF THE CASE

A. Statutory Background

1. Congress enacted the Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336 (codified at 42 U.S.C. § 12101 *et seq.*), "[t]o establish a clear and comprehensive prohibition of discrimination on the basis of disability." *Id.* (preamble). The ADA's principal employment-discrimination provision states: "No covered entity shall discriminate against a qualified individual on the basis of disability in regard to ... hiring, advancement, or discharge of employees ... and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). That provision echoes the similar antidiscrimination rule in Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of "race, color, religion, sex, or national origin." *Id.* § 2000e-2(a).

The ADA's antidiscrimination rule, like the Title VII rule, is enforced by both the EEOC and the Department of Justice (DOJ). As under Title VII, a person may initiate civil proceedings against her employer by filing a charge with the EEOC. 42 U.S.C. § 12117(a) (incorporating Section 2000e-5). If the EEOC determines that there is reasonable cause to believe the charge but proves unable to secure compliance through informal methods, it may bring a civil action in court. *Id.* § 2000e-5(f). The aggrieved person has the right to intervene in any action brought on her behalf by the EEOC, and may herself bring an action if the EEOC fails to act. *Id.*

The district courts possess broad remedial authority under the ADA, including the authority to

"enjoin the respondent from engaging in [an] unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ... or any other equitable relief as the court deems appropriate," *id.* § 2000e-5(g)(1) (incorporated by Section 12117(a)), including front pay, *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 853-54 (2001).

2. Congress granted religious organizations certain exceptions from the ADA's antidiscrimination provision. First, Congress established that the ADA's basic employment discrimination provisions "shall not prohibit a religious [organization] from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such [organization] of its activities." 42 U.S.C. § 12113(d)(1). That "co-religionist" exception resembles religion-related provisions in Title VII. *See id.* §§ 2000e-1(a), 2000e-2(e).

Congress also included in the ADA a separate exception for religious organizations *not* included in Title VII. That provision establishes that, for purposes of the ADA's antidiscrimination prohibition, "a religious organization may require that all applicants and employees conform to the religious tenets of such organization." *Id.* § 12113(d)(2).

3. As a complement to its antidiscrimination mandate, the ADA broadly prohibits employer retaliation: "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, as-

sisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a). The EEOC and DOJ have the same authority to enforce the retaliation provision as the antidiscrimination provision, and district courts possess the same remedial authority. *Id.* § 12203(c). Importantly, however, the co-religionist and religious-tenets exceptions to the ADA's antidiscrimination provision do not apply to the retaliation provision. *See id.* § 12113(d)(1)-(d)(2) (exceptions apply to "this subchapter"); *id.* § 12203 (retaliation provision, enacted in separate subchapter).

B. Factual Background

1. a. Hosanna-Tabor Evangelical Lutheran Church and School is an ecclesiastical corporation affiliated with the Lutheran Church-Missouri Synod (LCMS). Hosanna-Tabor operated a church and school in Redford, Michigan. Pet. App. 3a. The Hosanna-Tabor school taught students in kindergarten through eighth grade. J.A. 62.[1]

During the 2004-05 school year, Hosanna-Tabor was one of over 2,500 schools affiliated with the LCMS. Lutheran School Statistics, at 1.[2] Roughly 80% of the funding for LCMS schools came from tuition charged to the students. The average annual tuition was over $2,000 for elementary school students and approximately $5,500 for high school students. *Id.* at 2.

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[1] The school has since merged with another institution and no longer exists as a separate entity.

[2] *Available at* http://classic.lcms.org/graphics/assets/media/DCS/04-05SchlStats.pdf.

LCMS schools like Hosanna-Tabor's offer services to the general public, serving substantial numbers of non-Lutheran children. Of the more than 288,000 students enrolled in LCMS schools in 2004-05, some 35% were non-Lutheran, and 16% were "unchurched." *Id.*

LCMS schools employed approximately 18,000 teachers in 2004-05. *Id.* at 4; J.A. 102. Depending on their education level, elementary school teachers' annual salaries ranged from approximately $26,000 to $44,000. Lutheran School Statistics, at 4.

b. The Hosanna-Tabor school employed "contract" teachers and "called" teachers. J.A. 62. Contract teachers were chosen by the school board for one-year, renewable terms. Pet. App. 3a; J.A. 120. "Called" teachers were normally hired on an open-ended basis by the voting members of the church congregation. Pet. App. 3a.

A teacher becomes eligible for a "call"—an offer of employment made "after prayerful[] consider[ation]" by the congregation, Pet. Br. (PB) 6—after completing a "colloquy" course of study at a Lutheran university. Pet. App. 3a. The teacher's name is then placed on a list accessible to the schools affiliated with the Synod. *Id.* Once a teacher receives her first "call" from a congregation, the president of the district of the calling congregation bestows a commission upon the teacher in a religious ceremony, and the teacher becomes a "commissioned minister." LCMS Bylaws § 2.10.3.[3] "Commissioned ministers" are distinct from "ordained ministers," "who serve in

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[3] *Available at* www.lcms.org/Document.fdoc?src=lcm&id=928.

the office of public ministry (also known as the pastoral office) and have the power to preach the Word and administer the Sacraments." Brief of LCMS as *Amicus Curiae*, at 4. "Commissioned ministers," in contrast, "act as auxiliaries of the pastoral office, performing certain important functions of that office (though ordinarily not the administration of the Sacraments or the preaching of the Word)." *Id.*

Hosanna-Tabor—like the LCMS generally—did not require its teachers to be called, or to be Lutheran. J.A. 222. In 2004-05, two-thirds of the teachers in LCMS schools were "non-rostered," i.e., ineligible to be called. Lutheran School Statistics, at 4. Approximately 3,800 of the 18,000 teachers in LCMS schools were unaffiliated with any LCMS congregation. *Id.* Hosanna-Tabor did not require even its called teachers to be members of the church. J.A. 222. The school's non-Lutheran teachers (and contract teachers) had the same duties, and performed the same functions, as called teachers. Pet. App. 5a.

Called teachers normally receive tenure and may be dismissed only for cause. Pet. App. 3a. Dismissal is accomplished by rescinding the call, which is understood by Hosanna-Tabor and Synod officials as being "fired." J.A. 78, 106. When a school dismisses a called teacher by rescinding her call, the teacher may retain eligibility to receive a call from other schools within the LCMS, and need not lose her synodical status as a commissioned minister. *See* J.A. 107.

c. LCMS employment policy, as set forth in published documents, expresses "full agreement with

the intent of" the antidiscrimination laws, including with respect to discrimination on the basis of disability. Personnel Manual Prototype, § 2.200 (June 2003).[4] The LCMS set forth certain principles concerning the treatment of disabled employees in its Employment Resource Manual:

> There are many rules and regulations in the ADA. Churches need to understand the legal restrictions about discriminating against disabled individuals. Even when these rules are not technically applicable to a church, as a Christian organization the church should not discriminate against persons with disabilities and should, where reasonably possible without undue hardship, take the lead in making reasonable accommodations for disabled workers.

LCMS Employment Resource Manual at 6.[5]

2. In 1999, Hosanna-Tabor hired respondent Cheryl Perich as a contract, i.e., non-called, elementary school teacher. J.A. 112. In 2000, after Perich completed her colloquy, the school hired her as a called teacher. J.A. 113. Perich taught kindergarten until the end of the 2002-03 school year, and taught fourth grade during the 2003-04 year. J.A. 222.

As both a called and contract teacher, Perich was responsible for "the instruction of students in secular

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[4] *Available at* http://www.mns.lcms.org/LinkClick.aspx?fileticket=lMILvY-QnBA%3D&tabid=99&mid=469.

[5] *Available at* http://classic.lcms.org/graphics/assets/media/LCMS/EmploymentResourceManual2003.pdf.

subjects": "Math, Language Arts, Social Studies, Science, Gym, Art and Music." J.A. 222. She taught those subjects five days a week. J.A. 223. Perich used no religious books when teaching Math, Language Arts, Social Studies, or Science, and used "the same music book as was used in the local public school" when teaching music. J.A. 223.

In addition to her teaching of secular subjects, Perich taught a Religion class four days per week. Hosanna-Tabor did not require that the Religion class be taught by a Lutheran, by a called teacher, or by a teacher who had completed a colloquy. The teacher who taught fourth grade before Perich (and who taught Religion) was neither a Lutheran nor a called teacher. J.A. 223. Perich also attended chapel services with her students once a week, and led two to three services per year. Again, Hosanna-Tabor did not require the person leading the service to be either Lutheran or called. J.A. 224. Additionally, Perich's class read or listened to a devotional excerpt each morning, and Perich participated in a prayer with her students in the morning, at lunch, and at the end of the day. J.A. 224.

3. In June 2004, Perich was hospitalized after becoming ill during a Hosanna-Tabor golfing event. J.A. 113. By August, Perich's doctors had not definitively diagnosed her, and Stacey Hoeft—Hosanna-Tabor's principal—told Perich that she should take disability leave and that her job would be waiting for her when she returned. J.A. 160. Perich went on disability leave at the start of the 2004-05 school year. At that point, she received 100% of her pay while on leave.

In December 2004, Perich informed Hoeft that she had been diagnosed with narcolepsy, and that her doctor had begun the treatment process. The doctor told her she would be able to return to work in two to three months. J.A. 113, 163-64. One month later, Hoeft informed Perich that the school had "asked Mrs. Elizabeth Gavrun to substitute for you during your disability." J.A. 165.

On January 18, 2005, Perich again emailed Hoeft to inform her that her doctor was making progress in her treatments. J.A. 169. Hoeft responded the next day, saying that she was "so glad to hear that you have such a remarkable doctor." Hoeft also explained that the Board of Directors of the school had met the previous night and adopted a new disability policy under which Perich would no longer be carried by the church's disability insurance. Hoeft asked Perich about her plans for the following year, so that the school could "start the Call process if we have to." Hoeft concluded by asking: "Are you ever going to be allowed to drive again? I know nothing about narcolepsy. Any good websites you can recommend?" J.A. 167-68. Perich responded that most information about narcolepsy on the internet was outdated, but that she could send Hoeft materials she had received from her doctor. J.A. 166.

On January 21, Hoeft sent Perich another email thanking Perich "for all the info," because she had "no knowledge about [Perich's] condition. That's why I was wondering what your intentions were for coming back in the fall." "I don't want to mislead our new teacher," Hoeft explained. Hoeft also stated that Jim Pranschke, the church president, would amend the employment handbook to provide that

anyone who has a disability extending for longer than six months would be encouraged to resign their call "so the church and school will be able to fill the position responsibly." "We don't want to take your Call away, it's better for everyone if the employee would resign themselves obviously." J.A. 170.

4. At some point during this period, Hoeft called Superintendent Bruce Braun and stated, "we're really considering terminating Cheryl." Braun responded, "That's not my area of expertise, someone with a disability. You need to get an attorney who deals with labor issues, because that's not my area." J.A. 103. Hoeft later confirmed to Braun that they had indeed consulted with a lawyer. J.A. 105.

On January 27, 2005, Perich notified Hoeft that her medication was working, and that her doctor told her she could return to work between February 14 and 28. J.A. 172. "Wow!" Hoeft responded, "I am surprised to hear that you will be able to return so soon."[6] She asked: "How often are you 'passing out'? I know that it's not really passing out—how do you term it now?" Hoeft also stated that she "wonder[s] how you're not permitted to drive yet you can be responsible for the safety of a classroom of children. You can see why I'd be concerned." J.A. 173.

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[6] Hosanna-Tabor states that "Perich continued to offer revised estimates for her possible return." PB9. That is incorrect. In December 2004, she told Hoeft that her doctor would allow her to return to work within 2-3 months. J.A. 113, 163-64. That range was fully consistent with the February 14-28 range she provided to Hoeft on January 27, and with the eventual February 22 date her doctor settled upon. J.A. 113-14, 190.

On January 30, Hosanna-Tabor held a meeting of the congregation. There, unbeknownst to Perich, the congregation heard two "options" concerning Perich. Under the first, Perich would be responsible for paying her own health insurance premiums beginning in March 2005. Under the second, Hosanna-Tabor would pay a portion of Perich's medical premiums through December 2005, but only if Perich requested a "peaceful release from her call," i.e., resigned. J.A. 178, 186. Although Perich had told Hoeft three days earlier that her doctor had approved her return to work within the next several weeks, the presentation of the second option to the congregation stated that "[o]ur school administrator and the School Board feels it is very unlikely Ms. Perich will be physically capable to return to the classroom this year or next year." J.A. 186. The congregation supported the second option. Pet. App. 7a.

On February 9, Scott Salo, the chair of the school board, contacted Perich to arrange a meeting. Perich told him she preferred to meet with the entire school board, because she had "heard that Hosanna-Tabor wanted [her] to resign and because Stacey Hoeft had expressed doubts about [her] ability to return to work even though [her] doctor told [her] that [she] would be able to" do so. J.A. 113.

Perich attended a school board meeting on February 13. At the beginning of the meeting, Salo asked her to resign in exchange for paying for her medical insurance. Perich refused, and presented the board with a verification from her doctor saying she could return to work February 22. J.A. 113-14,

190.[7] One of the board members commented at the meeting that he "wouldn't drive if I were you, not even if the doctor says you can." J.A. 114. Another said that "I have a medical background and I know that you have to be without symptoms for at least three months before you can be sure that the medicine is working well enough that you won't have symptoms." J.A. 84, 114. The same person said that Perich might pass out and scare the children. J.A. 84, 193-94. None of the board members asked for additional information from Perich's physician. The school board did not change its position about seeking Perich's resignation and asked her to make a decision by February 21. Pet. App. 8a.

5. On the evening of February 21, Perich emailed Hoeft and said that she had "decided not to ask for a peaceful release" from her call. J.A. 199. The Hosanna-Tabor employee handbook stated that "Failure to return to work on the first workday following the expiration of an approved leave of absence may be considered a voluntary termination." J.A. 203. Perich was concerned that, if she did not return to work, she would be terminated under that policy. She therefore advised Hoeft that she would return to work the next day (as authorized by her doctor). J.A. 199.

On February 22, Hoeft met Perich when she arrived for work and told her she could not stay. Hoeft stated, "I'm not the only person that doesn't want you here. Parents have told me that they would be uncomfortable with you in the building." J.A. 115.

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[7] Contrary to Hosanna-Tabor's brief, there were no "recent reports of severe symptoms." PB9.

Perich refused to leave without some written verification that she had complied with the employee handbook by returning to work promptly after a leave of absence. Perich left upon receiving a letter from Hoeft and Salo stating, "Due to your improper notification to return to work, we are asking that you continue your leave on Tuesday, February 22, 2005 in order to allow the congregation a chance to develop a plan for your possible return." J.A. 230.

That afternoon, Hoeft and Perich spoke on the phone. Perich explained that she was attempting to work out her employment situation with the school board, but that she was consulting with an attorney and would file a disability discrimination suit if she could not otherwise resolve the problem. J.A. 115, 152. Hoeft later claimed in her deposition that the LCMS internal dispute resolution program was on her mind during this conversation, but Hoeft made no mention to Perich of any such concern. J.A. 152; *compare* PB10.

Hoeft informed the school board that Perich was contemplating a lawsuit. J.A. 154. That evening, Salo sent Perich a letter stating:

> Your actions of 2/22/05 are regrettable to say the least. By emailing Mrs. Hoeft at her work email at 9:03 pm on 2/21/05 it is clear that your intent was not to return to work, but rather to create upheaval in our school. You had already been informed at our meeting on 2/13/05 that there was no position for you .... Your behavior demonstrates your total lack of concern for the minis-

> try of Hosanna-Tabor Lutheran School. We are therefore reviewing the process of rescinding your call.

J.A. 229. The letter contained no mention of any requirement to use any internal dispute resolution process.

On March 19, Salo sent Perich a follow-up letter explaining that the congregation was to meet on April 10 to decide whether to rescind Perich's call. The letter stated that the board was taking this action "due to insubordination and disruptive behavior on Tuesday, February 22, 2005. We are also requesting this because we feel that you have damaged, beyond repair, the working relationship you had with the Administration and School Board by threatening to take legal action against Hosanna-Tabor Lutheran Church and School." J.A. 55. Nevertheless, the letter stated that, if Perich would agree by April 8, 2005, to resign voluntarily, the school would continue to pay her medical insurance through the end of the year and promote her name to other Lutheran schools. J.A. 56. The letter again made no mention of any requirement to use any internal dispute resolution process.

Two days later, on March 21, Perich's counsel sent Hosanna-Tabor's counsel a letter explaining that, while the school's actions violated federal and state employment discrimination law, Perich sought an amicable solution. J.A. 205-10. On April 11, Salo and Pranschke sent Perich a letter notifying her that the congregation had voted to rescind her call, and requesting that she retrieve her personal items and return her keys. J.A. 38.

After her termination from her teaching position at Hosanna-Tabor, Perich remained on the LCMS roster of teachers eligible for called positions at other schools within the Synod. J.A. 107. Indeed, Hoeft strongly recommended Perich to other congregations, and Braun—acting as District Executive—stated his understanding that her health "concern is erased with new medication." J.A. 54. Accordingly, it appears that LCMS continued to consider her a "commissioned minister." *See* LCMS Bylaws § 2.11.2 (addressing circumstances in which commissioned minister remains on LCMS roster of those eligible to be called). She remained on the roster as a commissioned minister until 2010, when she decided not to renew her application. *See* http://classic.lcms.org/pages/wPage.asp?ContentID=773&IssueID=44 (May 2010 LCMS notice of Perich's removal from the Ministers of Religion-Commissioned roster).

C. Proceedings Below

1. Perich filed a charge with the EEOC on May 17, 2005, alleging that Hosanna-Tabor had violated her rights under the ADA. Pet. App. 9a. The EEOC filed a complaint against Hosanna-Tabor in the district court on September 28, 2007. J.A. 14-18. The complaint alleged that Hosanna-Tabor had violated the ADA's retaliation provision by, among other things, "terminating Perich's employment in retaliation for threatening to file an ADA lawsuit." J.A. 16. Perich moved to intervene on March 11, 2008, and filed her own complaint on April 10, which added a retaliation claim under Michigan's Persons with Disabilities Civil Rights Act. Pet. App. 67a-74a. Perich sought monetary and injunctive relief, and also sought reinstatement. Pet. App. 73a-74a. The

request for reinstatement to her teaching position has no continuing relevance, however, as Perich no longer seeks that relief (and the complaint from the outset did not seek reinstitution of her religious status as "called").

On October 23, 2008, the parties moved for summary judgment. Hosanna-Tabor argued to the district court—for the first time—that it had a theological reason for terminating Perich: that she threatened to assert her legal rights to the EEOC and the courts, rather than use the church's internal dispute resolution process to resolve her statutory claims. Pet. App. 24a. Perich explained in an affidavit that she "was not aware of the resolution policy until 2008, years after [her] 2005 termination." J.A. 228.

2. The district court granted Hosanna-Tabor summary judgment on the ground that Perich fell within a so-called "ministerial exception" to the anti-discrimination laws. The court understood that exception to preclude application of the ADA if "the employer [is] a religious institution and the employee [is] a ministerial employee." Pet. App. 41a-42a (quoting *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007)). The court found that Perich was a "ministerial employee" because Hosanna-Tabor considered her to be a "commissioned minister," and a contrary conclusion would "infring[e] upon [Hosanna-Tabor's] right to choose its spiritual leaders." Pet. App. 52a (quotation omitted; second alteration in original).

3. The court of appeals vacated the judgment and remanded the case to the district court to decide the merits of the retaliation claim. Pet. App. 25a. The

court explained that "the overwhelming majority of courts that have considered the issue have held that parochial school teachers such as Perich, who teach primarily secular subjects, do not classify as ministerial employees for purposes of the [ministerial] exception." Pet. App. 17a. Rather, teachers have been found to be within the exception when they have "taught primarily religious subjects or had a central role in the spiritual or pastoral mission of the church." Pet. App. 18a-19a.

Here, the court explained, the "record supports the finding that Perich's employment duties were identical when she was a contract teacher and a called teacher and that she taught math, language arts, social studies, science, gym, art, and music using secular textbooks." Pet. App. 19a. After reviewing Perich's religious functions, the court concluded that her "primary function was teaching secular subjects, not 'spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship.'" Pet. App. 20a (quoting *Hollins*, 474 F.3d at 226).

Moreover, the court explained that adjudicating Perich's claim would not require secular courts to adjudicate church doctrine. The court observed that "Hosanna-Tabor has attempted to reframe the underlying dispute from the question of whether Hosanna-Tabor fired Perich in violation of the ADA to the question of whether Perich violated church doctrine by not engaging in internal dispute resolution." Pet. App. 24a. But even as reframed, the court would only have to decide "whether Perich was disabled within the meaning of the ADA, whether Perich opposed a practice that was unlawful under

the ADA, and whether Hosanna Tabor violated the ADA in its treatment of Perich." Pet. App. 24a. Accordingly, the court held that the "ministerial exception" would not bar application of the ADA.

SUMMARY OF ARGUMENT

Hosanna-Tabor fired Cheryl Perich from her teaching position in retaliation for her assertion of rights under the ADA. That action constitutes a paradigmatic violation of the ADA's anti-retaliation prohibition. Hosanna-Tabor contends that it is immune from the normal operation of that prohibition under a so-called "ministerial exception," which (it believes) allows a religious organization to fire with impunity any employee whom it considers to perform important religious functions—even if she also performs important secular functions, and even if she does so as part of a commercial enterprise.

Hosanna-Tabor asks the wrong question, and arrives at the wrong answer. The question is not whether Hosanna-Tabor is protected by a categorical "ministerial exception" nowhere found in the ADA. The question instead is whether the anti-retaliation prohibition is unconstitutional as applied to the circumstances of this case—*viz.*, to a religious association's retaliatory dismissal of a teacher of secular subjects in a commercially operated school. The answer is no. Contrary to Hosanna-Tabor's argument, neither the Free Exercise Clause, the Establishment Clause, nor the First Amendment right of expressive association gave it any entitlement to fire Perich in retaliation for her invocation of her right to be free from invidious discrimination.

First, with respect to the right of expressive association, a *secular* private school would have no expressive-association right to discharge a teacher in retaliation for her assertion of rights under the anti-discrimination statutes, even if the school possesses a sincere belief that disputes should be resolved internally rather than in civil courts. While such an institution would have a First Amendment interest in selecting its teachers, and while it might use its teachers to inculcate its core beliefs, the government would have an overriding interest in assuring access to commercial opportunities free from discrimination and retaliation and in providing access to courts to enforce those protections. The government interest would be particularly strong because private schools act as a substitute for compulsory public education.

The expressive-association analysis is no different for a religious school. Hosanna-Tabor elected to run a commercial institution that taught the secular curriculum as a substitute for compulsory public education. As with a non-religious private school, Hosanna-Tabor's associational interest in selecting its teachers is subject to the government's compelling interest in protecting teachers of secular subjects in a commercially operated school from discrimination and retaliation, and in affording access to courts to enforce those protections. Religious or not, an expressive association cannot render itself immune from civil suits against it by invoking a belief—however sincerely held—in the virtues of internal dispute resolution. Moreover, because Hosanna-Tabor has no religious objection to the employment of disabled individuals, its interest in foreclosing civil court resolution of the non-ecclesiastical, under-

lying dispute is significantly diminished, whereas the government's corresponding interest in assuring the resolution of civil claims in civil courts is strengthened.

None of this is to say that religious associations could never assert a successful expressive-association defense to the application of the antidiscrimination laws. This Court has established that an expressive association need not retain an individual in a leadership position when doing so would significantly undermine a central associational message and no compelling government interest would require it. There thus should be no worry that Title VII could require a church to ordain a priest to lead the congregation in contravention of a central tenet of its faith. The church's ability to convey its doctrinal views might be significantly impaired in such a situation, and the government interest would be diminished because the circumstances would not involve the performance of important secular functions in a commercial arena.

Hosanna-Tabor claims a far more sweeping immunity, however. In its view, a religious organization is entitled to violate the antidiscrimination laws for *any* employee whom it views to perform an important religious function, even if she also performs important secular functions in a commercial setting, and even if the basis for the firing is entirely unconnected to any religious belief. That expansive rule would leave hundreds of thousands of teachers without the protection from discrimination and retaliation that Congress intended to afford them. It would also reach beyond teachers to encompass administrative staff, as well as employees of social-services

organizations affiliated with religious institutions. And, critically, it would leave those employees wholly unprotected against retaliatory dismissals for, *inter alia*, asserting their right to minimum pay, unearthing health or safety violations, or, as in a case currently before the Court, reporting sexual abuse of a student. Nothing in the right of free association—or, indeed, in any right under the Religion Clauses—grants religious organizations such a sweeping exemption from neutral and generally applicable antidiscrimination laws.

The Free Exercise Clause provides no greater support for Hosanna-Tabor's expansive approach. The general rule under that Clause—applied to individuals and institutions alike—holds that neutral, generally applicable laws like the ADA are fully enforceable and need not give way to religious exercise. A religious organization thus has no constitutional entitlement to become a law unto itself. The Court instead has left it to Congress to accommodate religious exercise through enactment of legislative exceptions from antidiscrimination laws, and Congress has been equal to the task. The Court has recognized a limited exception to the rule allowing enforcement of neutral laws according to which civil courts may not take sides in a religious dispute. But Perich does not ask any court to take sides in a religious dispute—she does not here contest Hosanna-Tabor's asserted religious belief that disputes should be decided internally rather than in civil court. She instead seeks a determination that her firing violated the ADA's neutral, generally applicable retaliation provision, a determination requiring no judicial inquiry into the merits of any religious doctrine.

The Establishment Clause likewise afforded Hosanna-Tabor no entitlement to fire Perich in retaliation for asserting her right to be free from discrimination. Hosanna-Tabor is correct that one of the principal purposes of the Clause was to prevent government appointment of clergy. But the application of neutral, generally applicable laws barring discrimination hardly constitutes government appointment of an employee—it instead leaves institutions free to appoint any employee as long as they refrain from illicit discrimination or retaliation. Nor does the application of the ADA's retaliation provision to religious organizations inherently result in excessive entanglement. Rules neutral toward religion generally pose no Establishment Clause concerns, and the Court has ratified regimes—such as ongoing monitoring of religious institutions—involving significantly greater intrusions than the application of the antidiscrimination laws in discrete cases. Even if adjudication of *particular* cases might raise Establishment Clause concerns, that does not justify an across-the-board rule denying all employees viewed to perform important religious functions the protections of the neutral antidiscrimination laws.

Finally, the First Amendment does not bar any remedy in this case. Perich no longer seeks reinstatement, but even if she did, reinstatement to a teaching position with the same responsibilities and benefits would be available to her. And even if reinstatement were not available, monetary relief in the form of back- and front-pay would be. Such relief is not precluded when reinstatement is inappropriate, as is demonstrated by the common-law rule preventing specific performance of employment contracts—

but nonetheless requiring the payment of damages—on the rationale that employers should not be forced to accept unwanted employees. There is no merit to Hosanna-Tabor's claim that the mere threat of monetary damages would unduly impinge on its freedom to select ministers. Hosanna-Tabor need only refrain from violating the neutral antidiscrimination laws insofar as those laws may be constitutionally applied to it, just as any non-religious employer must do.

ARGUMENT

Hosanna-Tabor terminated Cheryl Perich's employment in violation of the ADA's anti-retaliation prohibition and Michigan's parallel law. Nothing in the First Amendment gave the school a blanket entitlement to fire Perich in retaliation for expressing an intention to exercise her right to file a discrimination claim.

I. This Case Squarely Implicates The Government's Compelling Interest In Eradicating Invidious Discrimination In Employment

A. The Employment Discrimination Laws Serve The Compelling Interest Of Eradicating Invidious Discrimination In The Workplace

1. The federal and state governments possess a "compelling interest in combating invidious discrimination." *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14 n.5 (1988) (quotation omitted); *e.g.*, *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *Roberts v. United*

States Jaycees, 468 U.S. 609, 623 (1984); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983). Congress accordingly enacted a series of employment discrimination statutes—including Title VII and the ADA—the "central statutory purposes" of which are "eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 254 (1994) (quotation omitted). Of particular salience, those federal statutes and their state law counterparts advance the "profoundly important goal of ensuring nondiscriminatory access to commercial opportunities in our society." *Roberts*, 468 U.S. at 632 (O'Connor, J., concurring).

2. The federal employment discrimination statutes aim to achieve their purpose by prohibiting discrimination on the basis of particular characteristics, and by providing remedies to deter future violations and compensate for past violations. *See McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357-58 (1995); 42 U.S.C. §§ 2000e-5(g)(1), 12117(a). In addition, each major employment discrimination statute prohibits retaliation against employees who exercise their primary statutory rights. *E.g.*, 42 U.S.C. § 2000e-3(a) (Title VII); *id.* § 12203(a) (ADA).

Those retaliation provisions are critically important: their "primary purpose" is "[m]aintaining unfettered access to statutory remedial mechanisms." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). The prohibition against discrimination on the basis of status would be a hollow promise—and would have no chance of "eradicating discrimination throughout the economy," *Landgraf*, 511 U.S. at 254—if an employer could simply fire any employee

who asserts her right to be free of discrimination. Consequently, even when an antidiscrimination statute contains no express bar against retaliation, this Court has frequently construed the law to include an anti-retaliation prohibition. *E.g.*, *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005).

3. In enacting the major employment discrimination statutes, Congress carefully considered the rights of religious organizations to worship freely and to control their membership. Thus, Congress established a "co-religionist" exception to Title VII's prohibition against discrimination, which generally permits religious organizations to discriminate in favor of adherents. *See* 42 U.S.C. §§ 2000e-1(a), 2000e-2(e). Congress enacted a parallel exception in the ADA. 42 U.S.C. § 12113(d)(1). The ADA also includes an additional provision—not included in Title VII—establishing that "a religious organization may require that all applicants and employees conform to the religious tenets of such organization." 42 U.S.C. § 12113(d)(2). Notably, however, Congress elected to apply those exceptions only to the substantive prohibition against disability discrimination, but *not* to the prohibition against retaliation. *See supra* at 3.

B. Perich's Claim Falls Squarely Within The ADA's Prohibition Against Retaliation

Hosanna-Tabor's actions violated the ADA. From the day Perich informed Hoeft that her doctor had brought her narcolepsy under control, Hoeft and others resisted her return to work based on mis-

guided apprehensions about her disability, even though her doctor had granted her full medical clearance to return to the classroom. *See supra* at 9-11. Throughout this period, the school repeatedly pushed Perich to resign, even after Perich explained that her doctor had cleared her to return to work. Pet. App. 8; J.A. 113-14, 178, 186. Then, after Perich stated that she would assert her legal rights under the ADA, the school fired her *explicitly* because she had "threaten[ed] to take legal action." J.A. 55-56.

This is a textbook case of retaliation in violation of the ADA and of the parallel provision under Michigan law, Mich. Comp. Laws § 37.1602(a). The terms of the ADA squarely foreclose this type of employer conduct, and the government has a compelling interest in eradicating it. Hosanna-Tabor argues, however, that the First Amendment shields it from liability for retaliating against Perich's exercise of her rights. For the reasons explained below, nothing in the First Amendment precludes application of the ADA's retaliation provision to this case.

II. The First Amendment Does Not Prevent Application Of Neutral, Generally Applicable Antidiscrimination Laws In The Circumstances Of This Case

Hosanna-Tabor correctly disclaims any argument that the ADA is unconstitutional in all its applications to a religious association. PB2, 19. The sole question presented therefore is whether the ADA is unconstitutional as applied in the circumstances of this case. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not formulate a rule of constitutional law

broader than is required by the precise facts to which it is to be applied."). In particular, the question is whether the ADA's retaliation provision—a neutral law of general application—is unconstitutional as applied to a religious association's retaliatory firing of a teacher of secular subjects in a commercially operated school.

The answer is no. Hosanna-Tabor invokes three potential sources of protection under the First Amendment in support of its broad claim of immunity from the ADA's retaliation provision: the Free Exercise Clause, the Establishment Clause, and the First Amendment right of expressive association. None affords the immunity Hosanna-Tabor seeks. Because the right to expressive association substantially informs the constitutional analysis under the Religion Clauses, we begin there.

It bears emphasis at the threshold, however, that Hosanna-Tabor starts in the wrong place in assuming the existence of a "ministerial exception" and proceeding to examine its scope. The ADA, like other employment discrimination laws, contains no "ministerial exception." While Hosanna-Tabor argues that every court of appeals has recognized some form of "ministerial exception," PB16-17, every published federal court of appeals opinion to consider the issue has refused to apply any "ministerial exception" to teachers of secular subjects in religious schools.[8] Reference to an ostensible "ministerial ex-

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[8] *See Geary v. Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 331 (3d Cir. 1993) (Catholic elementary school teacher, "notwithstanding [her] apparent general employment obligation to be a visible witness to the Catholic Church's philosophy and principles"); *DeMarco v. Holy Cross High Sch.*, 4

ception" does not advance the resolution of the question at issue—whether the ADA is unconstitutional as applied to the circumstances of this case.

Nor does that analysis hinge on whether the teaching of secular subjects is a teacher's "primary" duty. PB38-39. The Court may assume that a teacher in Perich's position performs important religious functions (whether as a called or uncalled teacher). But it is also undisputed that her teaching of secular subjects constituted an important secular function, and that she was to perform that secular function for all students—whether Lutheran or non-Lutheran—who purchased those services from the school. In such a case, the teacher may invoke the protections of the neutral and generally applicable antidiscrimination laws when subjected to discrimination or retaliation at the hands of her employer,

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F.3d 166, 172-73 (2d Cir. 1993) (Catholic school teacher whose duties included leading prayer and attending mass); *DeArment v. D.L. Harvey*, 932 F.2d 721, 721-22 (8th Cir. 1991) ("born-again Christian" class supervisors who regard teaching as "their personal ministry" and "conduct prayer and counsel" students in "a self-study program that teaches all subjects from a biblical point of view"); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392, 1396-97 (4th Cir. 1990) (teachers with a curriculum that included "instruction in Bible study and in traditional academic subjects into which biblical material had been integrated"); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1364, 1369-70 (9th Cir. 1986) (teachers occupying a "highly specialized role" at Christian school that church considered "a ministry" and "an integral part of the religious mission of the [c]hurch to its children"); *EEOC v. Miss. Coll.*, 626 F.2d 477, 485-86 (5th Cir. 1980) (faculty and staff of Baptist college who were "expected to serve as exemplars of practicing Christians").

no less than can a teacher subjected to the same mistreatment by a non-religious employer.

A. Right Of Expressive Association

The expressive-association inquiry turns on whether the retention of a person protected under the antidiscrimination laws would burden "in a significant way" a central associational message, and if so, whether the burden is "overridden" by "compelling state interests." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). Under that framework, a *secular* private school would have no immunity from application of the ADA's anti-retaliation protections in the case of a teacher of secular subjects at a commercially operated school. There is no basis for granting a religious school any greater protection for purposes of the right of expressive association.

1. *A secular private school has no expressive-association right to retaliate against a teacher for asserting ADA protections.*

a. The First Amendment recognizes a right to associate to operate private schools. *See Runyon v. McCrary*, 427 U.S. 160, 175-76 (1976). And private educational institutions possess a First Amendment interest in selecting teachers of their choice to carry out their mission and philosophy. *See Univ. of Pa. v. EEOC*, 493 U.S. 182, 195-99 (1990). But that First Amendment interest confers no entitlement to select teachers free from the constraints of neutral and generally applicable antidiscrimination laws. Even assuming the application of those laws incidentally affects a private school's exercise of First Amendment freedoms in connection with its selection of

teachers, the government's compelling interest in ensuring equal economic opportunity for teachers would take precedence. *See id.* at 198-202. Indeed, this Court has long recognized "the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils." *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925).

The government interest in regulating private schools is especially strong because those schools provide a substitute for the compulsory public education otherwise furnished by the state. In Michigan, for example, all school-age children must attend public school, unless they attend a private school "which teaches subjects comparable to those taught in the public schools to children of corresponding age and grade, as determined by the course of study for the public schools of the district within which the nonpublic school is located," or if they are home-schooled in accordance with state law. Mich. Comp. Laws § 380.1561. The "courses of study" in private schools, "and the qualifications of the teachers in those schools [must] be of the same standards as provided by the general school laws of [the] state." *Id.* § 388.551. Teachers in private schools must obtain the same certificate required of public school teachers, or must satisfy a separate certification requirement by demonstrating a 10-year history of teaching. *Id.* § 388.553. State law also imposes curricular requirements equally applicable to public and nonpublic schools. *See id.* § 380.116.

There is no constitutional immunity from such laws. On the contrary, "a substantial body of case law has confirmed the power of the States to insist

that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, *employ teachers of specified training*, and cover prescribed subjects of instruction." *Bd. of Educ. v. Allen*, 392 U.S. 236, 245-46 (1968) (emphasis added). Private schools are likewise subject to antidiscrimination laws when employing teachers.

b. The analysis would not change if a secular private school asked its teachers to infuse the school's core moral philosophies into the teaching of the basic academic curriculum—e.g., reading, writing, arithmetic. The government would possess the same overriding interest in protecting those who teach the basic academic curriculum in commercially operated schools against discrimination and retaliation, as well as in ensuring access to courts to enforce those protections.

Nor would it matter if a secular private school held a sincere moral belief paralleling the one asserted by Hosanna-Tabor in this case—*viz.*, that disputes between teachers and the association should be resolved internally, rather than in court. In enforcing nondiscrimination mandates that themselves serve interests of the highest order, Congress has a compelling interest in affording access to a neutral judicial forum for adjudication of the claim—e.g., to decide whether a condition constitutes a disability under the ADA or whether the employer satisfied the duty to make a reasonable accommodation—rather than entrusting resolution of the claim to the very body accused of the discrimination. Indeed, if private associations could render themselves immune from retaliation actions by invoking a belief in

the virtues of internal dispute resolution, it would be impossible to "[m]aintain[] unfettered access to statutory remedial mechanisms." *Robinson*, 519 U.S. at 346. While a private association may certainly express the view that disputes must be resolved internally, that association has no First Amendment right to establish itself as the exclusive arbiter of claims against it.

Accordingly, while a private school has a First Amendment interest in promoting its beliefs through its teachers—including potentially a morally grounded belief favoring internal resolution of disputes—the institution has no constitutional entitlement to avoid judicial enforcement of neutral prohibitions against discrimination and retaliation. *See, e.g.*, *Runyon*, 427 U.S. at 176.

2. ***A religious school such as Hosanna-Tabor possesses no greater rights of expressive association than a secular school.***

a. For purposes of the right of expressive association, a religious association operating a school has precisely the same interest as a secular association in selecting teachers of its choice to spread its message: as this Court explained in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), there is "no logical difference in kind between the invocation of Christianity by [a religious organization] and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons." *Id.* at 111; *see Roberts*, 468 U.S. at 622 (equating an "individual's freedom to speak, to worship, and to petition the government for the redress

of grievances" for purposes of the right "to engage in group effort toward those ends").

The government interest in protecting teachers against discrimination and retaliation likewise does not vary with whether a private school is operated by a religious association or a secular association. In either case, the government has an overriding interest in protecting teachers' nondiscriminatory access to employment opportunities, and their access to court to vindicate that protection.

In addition, religious private schools, no less than secular private schools, provide a substitute for compulsory public education. Mich. Comp. Laws §§ 380.1561, 388.553. This Court has held that "the state has power to impose" "secular educational requirements" on "religious" schools. *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (citing *Pierce*, 286 U.S. 510). And "if the State must satisfy its interest in secular education through the instrument of [religious] private schools, it has a proper interest in the manner in which those schools perform their secular educational function." *Allen*, 392 U.S. at 246-47. The state has a strong interest in assuring that teachers who serve that important secular function can do so free from discrimination. As with non-religious associations, moreover, the government's interests remain undiminished in the case of a religious school that asks its teachers to inject its moral philosophy into their teaching of core subjects. And as with non-religious associations, a religious belief that disputes should be resolved internally rather than in court does not allow a religious association to immunize itself from civil suit.

b. Hosanna-Tabor could have no expressive-association defense to Perich's retaliation claim. Whatever may be the result in other contexts, Hosanna-Tabor elected to run a commercially operated school—one open to adherents and non-adherents alike for a fee. And Perich taught secular subjects that the school was by law required to teach given its status as a substitute for compulsory public education. Perich therefore performed important secular functions in a commercial setting. The school's expressive-association interests, if any, do not trump the neutral antidiscrimination and anti-retaliation rules in that context, and the government has an overriding interest in protecting teachers like Perich from discrimination and retaliation.

That is particularly the case because Hosanna-Tabor has no religious conviction conflicting with the ADA's bar against discrimination based upon disability. The LCMS's stated view is that it "should not discriminate against persons with disabilities." *See supra* at 6. When the underlying claim of discrimination in no way bears on the church's religious message or dogma, Congress's interest in assuring the resolution of civil disputes in civil courts is especially strong. Conversely, the church's interest in internal resolution of the (admittedly non-ecclesiastical) dispute about whether it violated the ADA is diminished.

Additionally, to prevail on an expressive-association claim, an association must demonstrate that application of the antidiscrimination laws "would significantly burden" its ability to communicate its message. *Dale*, 530 U.S. at 653. Here, however, the LCMS's asserted belief in the necessity of

internal resolution of disputes is not absolute: the LCMS expressly exempts property and contract claims. Pet. App. 80a. The fact that Hosanna-Tabor allows members (and clergy) to file property and contract suits against it in civil court leaves it poorly positioned to claim any significant burden on its message from civil court adjudication of non-ecclesiastical questions under the ADA—such as whether a condition qualifies as a disability under the statute and whether the school has provided a reasonable accommodation.

Relatedly, Perich's intention to file an ADA suit, while assertedly in conflict with Hosanna-Tabor's and the LCMS's views, did not even compel the loss of Perich's synodical status within the LCMS. Although relieved of her call by her congregation, Perich remained on the LCMS roster of teachers eligible to be called. J.A. 107. Indeed, Hoeft and Braun supported her placement on the LCMS roster and strongly recommended her to "LCMS calling bodies," giving her a high rating as a "Christian Educator"—i.e., "Better than ... [f]ully satisfactory and consistent performance" and "occasional Exceptional performance." J.A. 54. Moreover, the loss of her call did not relieve Perich of her LCMS status as a commissioned minister. Hosanna-Tabor officials would not have given her strong reviews, and the LCMS would not have kept Perich on its roll of teachers eligible for a call or continued to consider her a commissioned minister, if her presence significantly undermined the church's message about dispute resolution.

Finally, Hosanna-Tabor not once mentioned to Perich that its reasons for her termination had any

religious basis until after this litigation commenced. *Compare Dale*, 530 U.S. at 645 (explaining that Boy Scouts immediately informed Dale in response to his inquiry that they revoked his membership because the Boy Scouts "specifically forbid membership to homosexuals"). If Perich's presence in the organization substantially undermined the church's religious message, one would have expected the church to say so.

3. ***Religious associations, like non-religious associations, may have an expressive-association right to disregard antidiscrimination laws in certain contexts.***

While neither secular nor religious associations have an expressive-association defense to the ADA's application in the circumstances of this case, that is not to say that such associations could *never* assert an expressive-association defense to the application of the antidiscrimination laws. This Court has established that expressive associations need not comply with antidiscrimination laws when doing so would require retaining an individual whose presence in a leadership position would significantly undermine a central expressive message of the association, absent an overriding state interest. *Dale*, 530 U.S. at 647-61; *see also id.* at 702 (Souter, J., dissenting).

Religious associations may have a right to select the leaders of their congregations in analogous circumstances. Contrary to Hosanna-Tabor's argument, therefore, there should be no concern (PB18) that Title VII could prevent the Catholic Church or

an Orthodox Jewish congregation from ordaining an all-male priesthood or rabbinate. Even assuming Title VII would otherwise apply in that context,[9] those organizations would possess an expressive-association right to refrain from selecting leaders whose presence would significantly undercut their ability to convey to their congregations a central message of their faith—e.g., a belief that males alone have a distinct religious status making them uniquely fit to serve in the priesthood or rabbinate as leaders of the congregation. *See id.* at 648 ("The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."). Moreover, the state's interest in applying the antidiscrimination laws is weakened in such circumstances—where, unlike here, the subject of discrimination is not engaged in commerce or in the performance of important secular functions.

But once a religious association elects to establish a commercial operation—particularly a school teaching a core secular curriculum to the general public for a fee—its associational interests as to employees participating in such a venture are diminished, and the government's interests in enforcing the antidiscrimination laws are enhanced. Indeed, this Court has specifically contrasted "religious *schools*," on the one hand, with "churches or other *purely religious institutions*," on the other, with the latter receiving significantly greater constitutional protection from

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[9] A court would need to conclude, for instance, that a church's gender criterion fails to qualify as a bona fide occupational qualification. *See* 42 U.S.C. § 2000e-2(e).

antidiscrimination laws. *Bob Jones Univ.*, 461 U.S. at 604 n.29 (second emphasis added).

A church operating a private school is thus nothing like a political party. PB33-34. A political party presumably is subject to the antidiscrimination laws when selecting its leaders, but even if it were not, a party that elected to establish a school would have no blanket entitlement to fire its math teachers based on their race, sex, or disability. Religious organizations that extend their operations beyond worship and spreading the faith into the secular, commercial realm must abide by neutral rules that apply to all such enterprises, *see Allen*, 392 U.S. at 245-47, including antidiscrimination laws.

4. *Hosanna-Tabor's claim of immunity is unduly expansive and would severely undercut the antidiscrimination laws.*

According to Hosanna-Tabor, the right of expressive association supports giving it absolute immunity from the antidiscrimination laws for any employee who "perform[s] important religious functions." PB2, 50. And when assessing an employee's functions and their "importance to the Church's mission," Hosanna-Tabor argues, religious organizations should be accorded deference. PB48. Hosanna-Tabor's position thus is that a religious association can act with impunity against any teacher of secular subjects, so long as the teacher also performs "important religious functions" as defined by the association itself. For the reasons explained, Hosanna-Tabor's broad claim of immunity finds no support in

the right of expressive association, which by nature calls for a case-specific inquiry.

Moreover, Hosanna-Tabor's expansive "ministerial exception," if accepted by the Court, would have profound—and profoundly adverse—consequences for the operation of the antidiscrimination laws. Under Hosanna-Tabor's rule, *any* teacher in a religious school could be fired based on *any* prohibited ground: race, sex, national origin, disability, or age. Neither Congress nor the states would be able to protect from discrimination a female math teacher denied a position based on a belief that women lack proficiency in math, or an African-American passed over for hire to teach English on the belief that African-Americans speak poor English. Hosanna-Tabor's approach would expose a great many employees engaged in commercial enterprises to the potential of invidious discrimination. The sweep of that approach, and the severity of its implications, counsel strongly against accepting it under the right of expressive association (or, indeed, under the Free Exercise or Establishment Clauses, *see infra* 42-58).

a. Under Hosanna-Tabor's rule, religious schools could discriminate against any teacher on any protected ground, regardless of whether the discrimination stems from a religious belief. That approach would leave vast numbers of teachers without the protection against discrimination that Congress intended to afford. There are approximately 18,000 teachers in Lutheran Schools across the country. J.A. 102. And the United States' 6,980 Catholic schools employ over 151,473 professional staff, more

than 95% of which are laity.[10] In all, there are 22,731 religious elementary and secondary schools in the United States, which employ 314,489 full time equivalent teachers. U.S. Dep't of Education, Characteristics of Private Schools in the United States: Results From the 2009–10 Private School Universe Survey, at 7 (Table 2).[11] Unless those employees happen to perform no religious functions—or only religious functions that their church deems unimportant—they would all be left without protection from discrimination based on race, sex, and disability, contrary to Congress's intent.

b. The implications of Hosanna-Tabor's approach are particularly troubling in the context of retaliation claims. Hosanna-Tabor does not argue that the Lutheran faith requires discrimination on the basis of disability; on the contrary, the LCMS forbids discrimination on the basis of disability. Yet Hosanna-Tabor claims immunity from suits asserting disability-discrimination, on the ground that all disputes—even secular disputes involving no ecclesiastical questions—must be resolved internally by ecclesiastical authorities.

If that theory were accepted, religious organizations would be able to retaliate against their employees for asserting rights to minimum pay under the Fair Labor Standard Act, 29 U.S.C. § 215(a)(3), even though the organization is otherwise fully subject to that law. *See Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985) (religious organizations subject to FLSA). Religious organiza-

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[10] *See* http://www.ncea.org/news/annualdatareport.asp.

[11] *Available at* http://nces.ed.gov/pubs2011/2011339.pdf.

tions could retaliate at will against employees who complain about hazardous conditions at a school in violation of OSHA. 29 U.S.C. § 660(c). And religious organizations would be immune from myriad federal and state whistleblower laws, including laws that outlaw retaliation against insiders who report serious crimes.

A currently pending petition for certiorari in this Court demonstrates the reality of that possibility. In *Weishuhn v. Catholic Diocese*, No. 10-760 (U.S.), a Catholic school teacher hired to teach both math and religion (Pet. for Cert. 9) was fired, she alleges, in part for reporting sexual abuse of a student to the Michigan government. She alleged a violation of the Michigan Whistleblowers Protection Act, Mich. Comp. Laws § 15.361 *et seq.* (Pet. for Cert. 16 n.2). The Michigan court of appeals found that the teacher had no recourse under the Whistleblowers Protection Act because the school was protected by the "ministerial exception." *Weishuhn v. Catholic Diocese*, 787 N.W.2d 513, 517, 519-22 (Mich. Ct. App. 2010). The court "recognize[d] that it seems unjust that employees of religious institutions can be fired without recourse for reporting illegal activities," but nonetheless determined that applying the Whistleblower Protection Act to the school would violate the First Amendment. *Id.*

Hosanna-Tabor's rule would compel the same result. But the state plainly has an overriding interest in protecting employees of religious institutions who report serious crimes or other violations of law to civil authorities. The First Amendment should not be read to impede the operation of those laws against religious organizations.

c. Hosanna-Tabor's approach would not be limited to teachers, or even employees at schools. Religions have varying views concerning which of their functions are religious in nature. "For some denominations, there is simply no line that can be drawn between religious and nonreligious functions. Everything that goes on within the organization is suffused with religious significance." Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of* Smith, 2004 B.Y.U. L. Rev. 1633, 1697.

For example, the Southwestern Baptist Theological Seminary considered its administrative and support staff part of the ministry. *EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 284-85 (5th Cir. 1981). That was consistent with the views of certain evangelical Protestants, for whom "all church members who use their gifts to serve the religious mission of the church play a ministerial role." Brady, *supra*, at 1693. As another example, "in the Catholic Church's social mission, those who feed and counsel the needy also proclaim the Church's message just as much as do preachers from the pulpit." *Id.* at 1694 (citing ecclesiastical sources). "Thus, while the operations of Catholic social services organizations may appear to be essentially secular, they are, in fact, suffused with religious significance." *Id.* at 1697.

Hosanna-Tabor's rule would exempt from the antidiscrimination laws any position a religious organization deems religiously important, whether a teacher of secular subjects at a school, an employee at a school more generally, or an employee in a church-affiliated social-services organization. There

is no basis in free-association doctrine for such a sweeping exclusion from generally applicable, neutral antidiscrimination laws. Secular private associations are subject to those laws. Religious associations should have no greater immunity, either for purposes of the right of expressive association, or, as explained directly below, the Religion Clauses.

B. Free Exercise Clause

The ADA and other employment discrimination statutes are neutral rules that apply generally to religious and non-religious organizations alike, except to the extent Congress has expressly enacted exemptions for religious organizations. The Free Exercise Clause does not require the broad categorical carve-out from those laws sought by Hosanna-Tabor.

1. *The enforcement of neutral laws of general applicability raises no Free Exercise Clause concern.*

a. The Free Exercise Clause prohibits laws that target or aim to suppress religious activity. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). But the Free Exercise Clause poses no bar to the application of a "valid and neutral law of general applicability on the ground that the law" incidentally burdens religious practice. *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 879 (1990).

The rule allowing enforcement of neutral laws of general applicability applies to religious organizations no less than individuals. Indeed, this Court held in *Jones v. Wolf*, 443 U.S. 595 (1979), that it does not "'inhibit' the free exercise of religion" to ap-

ply to a religious organization "neutral provisions of state law governing the manner in which churches own property, *hire employees*, or purchase goods." *Id.* at 606 (emphasis added); *see City of Boerne v. Flores*, 521 U.S. 507, 544 (1997) (Scalia, J., concurring) ("[S]hall it be the determination of this Court, or rather of the people, whether ... church construction will be exempt from zoning laws? The historical evidence put forward by the dissent does nothing to undermine the conclusion we reached in *Smith*: It shall be the people."). The ADA—like every relevant antidiscrimination statute—is a neutral rule of general applicability. The ADA's application in this case thus raises no Free Exercise Clause concern.

As this Court has explained, allowing an objection to the application of a neutral law of general applicability under the Free Exercise Clause would unduly impinge on the "government's ability to enforce generally applicable prohibitions of socially harmful conduct," *Smith*, 494 U.S. at 885, including invidious discrimination, *see Bob Jones Univ.*, 461 U.S. at 604. And recognition of any "private right to ignore generally applicable laws" based on one's religious beliefs would enable an individual "to become a law unto himself." *Smith*, 494 U.S. at 885-86 (quotation omitted). Any such entitlement would "contradict[] both constitutional tradition and common sense." *Id.* at 885.

b. While the Free Exercise Clause affords no protection against application of a neutral, generally applicable law to religious conduct, the legislature can supply that protection by enacting religious exemptions from general laws. As this Court has explained, a "society that believes in the native protec-

tion accorded to religious belief can be expected to be solicitous of that value in its legislation." *Id.* at 890.

Accordingly, Congress enacted the "co-religionist" exceptions to Title VII and the ADA to accommodate religious exercise, 42 U.S.C. §§ 2000e-1(a), 2000e-2(e), 12113(d)(1), and it further enacted a "religious tenets" exemption to the ADA's antidiscrimination prohibition, *id.* § 12113(d)(2). Congress has also established more general protections for the practice of religion in, for example, the Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141.[12] But Congress has nowhere established the broad "ministerial exception" Hosanna-Tabor seeks here.

2. ***This case does not require a court to take sides in a religious dispute.***

a. While the Free Exercise Clause permits the application of neutral laws to religious conduct, it does not permit a court to enforce a neutral rule so as to take sides in a religious dispute. *Smith*, 494 U.S. at 877 ("The government may not ... lend its power to one or the other side in controversies over religious authority or dogma."); *Jones*, 443 U.S. at 602 (First Amendment prevents "resolution of issues of religious doctrine," and "requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization"). That concern is not in issue here.

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[12] *See also, e.g.*, Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274; 20 U.S.C. § 1681(a)(3) (exempting religious organizations from provision of Title IX); 42 U.S.C. § 3607(a) (exempting religious organizations from provision of Fair Housing Act).

Perich asserts only that she was wrongly terminated from her teaching responsibilities in retaliation for asserting her right to sue for disability discrimination. Resolution of that question does not require the court to resolve a Lutheran doctrinal dispute. The civil court need not consider whether Lutheran doctrine in fact requires called teachers to follow the Synod's internal dispute resolution procedures. It can take the church's assertions about Lutheran doctrine as a given, but nevertheless determine that Perich's termination violated the ADA's retaliation provision—a neutral law of general applicability that does not give way to religious conviction, no matter how sincere or important. *Smith*, 494 U.S. at 879.

Nor does it matter that Perich was a called teacher or commissioned minister. The fact remains that she taught secular subjects in a commercial setting. And the question whether Hosanna-Tabor retaliated against her for threatening to assert her rights under the ADA is a secular question for a secular court, not an ecclesiastical question for an ecclesiastical court. Indeed, called and uncalled teachers had "identical" duties. Pet. App. 4a; *see supra* at 5-7. The question in this case thus is the same as would have been presented if Hosanna-Tabor had fired an uncalled teacher of the same secular subjects in the same commercial setting in retaliation for her exercise of ADA rights.

b. Hosanna-Tabor argues that several cases concerning church property disputes—and particularly *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), and *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1975)—dictate a much

broader zone of protection from neutral rules of general applicability, ostensibly encompassing the "right of a church to select the personnel who perform important religious functions." PB25-26. Those cases stand for no such broad proposition. They stand only for the narrow rule, already stated, that civil courts may not take sides in a religious dispute.

Kedroff held unconstitutional a New York law—neither neutral nor generally applicable—declaring the Russian Orthodox Church in America (and not the historical Church centered in Moscow) as the true Church, with resulting control of St. Nicholas Cathedral in New York. That statute was based on a legislative finding that the Moscow church "was no longer capable of functioning as a true religious body, but had become a tool of the Soviet Government." 344 U.S. at 106 n.10. This Court explained that the "controversy concerning the right to use St. Nicholas Cathedral is strictly a matter of ecclesiastical government, the power of the Supreme Church Authority of the Russian Orthodox Church to appoint the ruling hierarch of the archdiocese of North America." *Id.* at 115. The First Amendment provides religious organizations "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 116.

Serbian involved a similar dispute, this time brought by an American-based bishop of the Serbian Orthodox Church who objected to his removal by his Serbian superiors and to the Mother Church's decision to reorganize its North American administration. He sought to retain control over church assets and "to have himself declared the true Diocesan

Bishop" of the Church. 426 U.S. at 707. The Illinois Supreme Court found in his favor, based on its "interpretation of the Church's constitution and penal code," and on its view that the Mother Church acted "beyond the scope of [its] authority to effectuate such changes without Diocesan approval." *Id.* at 708. This Court again declined to resolve the internal church dispute, explaining that "First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice." *Id.* at 709-10; *accord Watson v. Jones*, 80 U.S. 726, 727 (1871) (in dispute between two recently separated churches, holding that civil authorities must accept "as final" the decisions of "church judicatories" on "questions of discipline, or of faith, or ecclesiastical rule, custom, or law").

Although a church has substantial discretion to choose its leadership and to "select the personnel who perform important religious functions," PB 25-26, *Kedroff*, *Serbian*, and similar cases do not remotely establish any entitlement to make those decisions without regard to the antidiscrimination laws. Rather, they merely establish the rule, reaffirmed in *Smith* and *Jones*, that civil courts may not take sides in a religious dispute. Perich does not ask any court to do so here, and the Free Exercise Clause poses no impediment to a court's enforcement of the ADA's neutral, generally applicable retaliation provision against Hosanna-Tabor in this case.

c. To the extent the church property cases can be read to support any broader proposition, it is that religious associations possess the *same* First Amendment rights as non-religious associations. *See, e.g.*,

Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16-17 (1929) ("In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive.... *Under like circumstances, effect is given in the courts to the determinations of the judicatory bodies established by clubs and civil associations.*" (emphasis added)); *Watson*, 80 U.S. at 714 ("Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints.").

In this respect, the Free Exercise Clause may "reinforce" the protection of the right of expressive association. *Smith*, 494 U.S. at 882. But even if that understanding would, for instance, result in recognition of a right to select priests and rabbis on the basis of gender, it would not support Hosanna-Tabor's expansive notion that it can act without constraint against teachers of secular subjects in a commercially operated school. That expansion would allow a religious association "'to become a law unto [it]self.'" *Smith*, 494 U.S. at 885 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).

d. Even if the church property cases stood for the broader proposition Hosanna-Tabor asserts—*viz.*, that even neutral rules must give way to an absolute "right of religious organizations to control their internal affairs," PB15—that would still not grant religious associations the right to discharge teachers of secular subjects at commercially operated schools.

After all, the Justices who disagreed with the majority's approach in *Smith* still believed that a state's significant interference with religious exercise could be overridden by a compelling government interest. *See* 494 U.S. at 894 (O'Connor, J., concurring in judgment). And that remains true even of laws that *target* religious exercise. *See Lukumi Babalu Aye*, 508 U.S. at 531-32. The church property cases are not to the contrary: it is difficult, for instance, to see any significant state interest, much less a compelling one, in determining which branch of the Russian Orthodox Church will control a New York cathedral.

In contrast to those cases, the government has a compelling interest in protecting teachers of secular subjects at commercially operated schools from discrimination and retaliation. Indeed, those interests are particularly compelling in light of the adverse consequences of adopting Hosanna-Tabor's favored rule. *See supra* at 37-42. And the antidiscrimination laws—which typically include robust protections for religious organizations—are plainly narrowly tailored to serve the government's interest.

C. Establishment Clause

The Establishment Clause affords Hosanna-Tabor no categorical entitlement to fire a teacher in retaliation for invoking her rights under the antidiscrimination laws. "A central lesson of [this Court's] decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995). The antidiscrimination laws are perfectly "neutral toward religion," *id.* at 840,

except that Congress has carved out special *benefits* for religious organizations (such as the co-religionist exception and the ADA's religious-tenets exception) not granted to secular institutions. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (upholding co-religionist exception against Establishment Clause challenge). Nothing on the face of the anti-discrimination laws thus remotely suggests a violation of the Establishment Clause, much less as applied to a teacher of secular subjects in a commercially operated school. And nothing in the Establishment Clause compels accepting the profoundly adverse consequences wrought by Hosanna-Tabor's proposed rule. *See supra* at 37-42.

1. ***Application of the ADA in this case does not amount to state appointment of clergy.***

In arguing that the Establishment Clause grants it a broad license to fire any employee performing an important religious function, Hosanna-Tabor invokes colonial and early state history, when clergy were routinely appointed by politicians or popular vote. PB26-28. Hosanna-Tabor is no doubt correct that "government-appointed ministers were one of the quintessential features of the established church." PB26. But that concern has no bearing on the application of neutral antidiscrimination statutes to employees (like school teachers) who perform significant secular functions in a commercial institution.

The historical evil Hosanna-Tabor describes was the state's power literally to appoint the clergy and to choose who would lead a particular congregation.

PB26-28. A court's application of a neutral law to the question whether a church employee, like a school teacher, suffered an adverse employment action for discriminatory reasons hardly amounts to "government appointment of ministers," PB28, any more than the ordinary application of Title VII amounts to "government appointment" of every employee of every covered employer in the Nation. *See Univ. of Pa.*, 493 U.S. at 198 (EEOC "is not providing criteria that petitioner *must* use in selecting teachers," "[n]or is it preventing [petitioner] from using any criteria it may wish to use, except those—including race, sex, and national origin—that are proscribed under Title VII").

As Hosanna-Tabor's historical analysis demonstrates, moreover, the concern animating the Establishment Clause involved state installation of clergy as leaders of congregations. PB26-28. This case, by contrast, concerns the application of the antidiscrimination laws to church employees operating in commerce and performing important secular functions. Hosanna-Tabor makes no effort to argue that the Establishment Clause was historically concerned with preventing application of neutral rules of general applicability in that situation.

2. ***Application of the ADA in this case presents no entanglement problem.***

a. In Hosanna-Tabor's view, most employment disputes between a church and an employee performing an important religious function "involve inherently religious questions," and "[r]esolving the dispute over the proffered religious reasons would

require the courts to resolve a theological dispute." PB29 (quotation omitted). That is incorrect.

Hosanna-Tabor's rule would encompass any employee viewed by the church to perform important religious functions, regardless of whether she also performs important secular functions. As to such employees, there is no reason to believe that resolution of employment disputes invariably would involve the need to resolve religious questions; they may just as easily raise questions such as whether a math teacher is an effective instructor of geometry. Application of the antidiscrimination laws in those circumstances serves only to assure that one of the reasons for an adverse employment action is not, for instance, that the teacher is disabled. Unless the gravamen of the suit is that a proffered religious justification does not in fact represent an accurate understanding of religious doctrine, courts would have no need to resolve a religious dispute when adjudicating discrimination claims. *See supra* at 44-45.

Nor does LCMS's designation of Perich as a "called" teacher or "commissioned minister" create an Establishment Clause problem where one otherwise would not exist. "While religious organizations may designate persons as ministers for their religious purposes free from any governmental interference, bestowal of such a designation does not control their extra-religious legal status." *Dole*, 899 F.2d at 1396 n.13 (quoting *Sw. Baptist*, 651 F.2d at 283). Religious designations such as "called" or "commissioned" therefore may be insulated from civil scrutiny when made for "religious purposes," *id.*, and Perich does not seek reinstatement of any such religious designation (or reinstatement at all). But such

designations do not control an employee's "extra-religious legal status" under the antidiscrimination laws. *Id.* They thus afford no blanket entitlement to retaliate against the assertion of rights by persons performing important secular functions in a commercial setting.

Finally, insofar as adjudication of a discrimination claim on occasion may risk entangling civil courts in religious questions, that is hardly a reason for a categorical bar. Indeed, "[n]ot all entanglements ... have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, and ... [e]ntanglement must be 'excessive' before it runs afoul of the Establishment Clause." *Agostini v. Felton*, 521 U.S. 203, 233 (1997) (quotations omitted). This Court has permitted significantly greater—and ongoing—state interference with religious institutions than would arise from the application of the antidiscrimination laws in discrete cases. *See id.* at 211-12 (approving a monthly unannounced visit to religious school teachers' classrooms by a publicly employed field supervisor examining the use of federal grant money); *Bowen v. Kendrick*, 487 U.S. 589, 616-17 (1988) (approving similar ongoing monitoring scheme). Indeed, this Court has long recognized the state's authority to exercise significant regulatory authority over religious schools, including over teacher qualifications. *See supra* at 29-30, 32. Application of the antidiscrimination laws to religious schools should pose no greater concern.

b. Hosanna-Tabor contends that entanglement concerns can become particularly acute when a civil court examines whether a religious organization's proffered reason for an employment action is pretex-

tual. PB29-30, 54-59. Even if true, that contention would have no application in this case, because Perich's retaliation claim does not depend on a showing that Hosanna-Tabor's justification for firing her was pretextual. Rather, the church admits that it fired her in retaliation for suggesting that she would pursue civil antidiscrimination remedies. J.A. 55.

In any event, even in cases involving no such concession by a religious organization that it acted on the basis of a statutorily prohibited criterion, determining the actual reason for the organization's action would not invariably run afoul of the Establishment Clause. In Hosanna-Tabor's view, a civil court in undertaking a pretext analysis would necessarily be called upon to determine whether the "substantive decision was motivated by the Church's religious beliefs." PB57. But asking whether a religious belief *motivated* the decision is distinct from asking whether the church actually *has* the belief. Only the latter question raises serious entanglement concerns, because "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989).

To be sure, a pretext analysis *in certain cases* might raise entanglement concerns. For example, suppose a pastor is dismissed on the stated ground of ineffectiveness in delivering sermons, and he seeks to prove that the decision in fact turned on his race. The Religion Clauses would prevent him from attempting to show that his sermons in fact *were* effective in spreading the Gospel. That is an inherently religious determination outside the ken of a civil

court. But the Establishment Clause would not prevent the plaintiff from introducing evidence showing, for example, that his superiors repeatedly made racially discriminatory remarks. Such a case would not necessarily require engaging the merits of any religious question. Thus, the fact that the Establishment Clause may prevent the application of the antidiscrimination laws in *some* pretext cases does not remotely suggest that it should prevent their application in *all* cases concerning employees who perform important religious functions.

Indeed, this Court has already ratified pretext analysis in a case involving the discharge of a teacher from a religious school. In *Ohio Civil Rights Commission v. Dayton Christian Schools*, the reason given for the discharge was—as here—failure to use an internal dispute resolution program. 477 U.S. 619, 623 (1986). The Ohio Civil Rights Commission "determined that there was probable cause to believe that Dayton had discriminated against [the teacher] based on her sex and had retaliated against her for attempting to assert her rights." *Id.* at 624. The school argued that "the mere exercise of jurisdiction over it by the state administrative body violates its First Amendment rights" under the Religion Clauses. *Id.* at 628. This Court rejected that argument, holding that "however Dayton's constitutional claim should be decided on the merits, the Commission violates no constitutional rights by merely investigating the circumstances of [the teacher's] discharge in this case, *if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge.*" *Id.* (emphasis added).

c. Hosanna-Tabor contends that the very "process of investigating" antidiscrimination claims will lead to civil courts' impermissible entanglement in religious matters. PB31. That argument proves far too much. If merely subjecting churches to standard legal process such as discovery and cross-examination violates the Establishment Clause, no legal action against any religious institution would ever be constitutional. That is not the law. *See, e.g.*, *Jones*, 443 U.S. at 606; *Watson*, 80 U.S. at 722-26. And the district courts possess ample leeway to manage discovery so as to avoid excessive entanglement in any particular case.

Indeed, it is Hosanna-Tabor's favored rule—which requires courts to decide whether an employee performs important religious functions—that poses a more substantial risk of entangling civil courts in religious questions. That test "necessarily requires the court to determine whether a position is important to the spiritual and pastoral mission of the church." *Rayburn v. Gen. Conference of Seventh Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985). To be sure, Hosanna-Tabor believes religious institutions should receive deference on that issue, but it agrees that "deference is not abdication." PB49. When a legal test turns on whether an individual performs "important religious functions," it is inevitable that a court would have to decide which functions are of particular religious significance to a church.

d. Finally, Hosanna-Tabor errs in relying on this Court's decision in *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979). That case presented the question whether the National Labor Relations Act's grant of

jurisdiction to the NLRB over church-operated schools violated the Religion Clauses. The Court avoided deciding that question by holding that the Act does not grant the NLRB such jurisdiction in the first place. *Id.* at 507.

Because the Court did not reach the constitutional question presented in *Catholic Bishop*, the decision does not establish the proposition that NLRB jurisdiction over religious schools would create excessive entanglement, much less that application of the antidiscrimination laws would do so. Moreover, the degree of entanglement inherent in extending NLRB jurisdiction over religious schools—including the Board's continuing authority to determine and adjudicate "unfair labor practices," and the requirement that the church engage in collective bargaining with teachers, 29 U.S.C. § 158(a), (d)—is far more substantial than would be raised by applying the antidiscrimination laws to religious schools in individual cases. As this Court explained, NLRB jurisdiction over church-school teachers would reach "nearly everything that goes on in the schools." 440 U.S. at 503 (quotation omitted). Not so with the antidiscrimination laws, which are concerned solely with whether adverse employment actions are made on the basis of a protected status.

At any rate, the law on excessive entanglement has changed considerably since *Catholic Bishop*, which relied heavily on the earlier opinion in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See* 440 U.S. at 501. Decisions since then have sanctioned substantial government monitoring of religious institutions, *see supra* at 53, and have established as a "central lesson" that "neutrality towards religion" is a princi-

pal consideration in Establishment Clause challenges, *Rosenberger*, 515 U.S. at 839. The antidiscrimination laws are neutral towards religion, and their application to religious institutions in the same manner as to secular institutions does not violate the Establishment Clause.

III. The First Amendment Poses No Remedial Bar In This Case

Hosanna-Tabor argues that the Establishment Clause forecloses one of the principal remedies afforded to successful civil rights plaintiffs—reinstatement, or its monetary equivalent, 42 U.S.C. §§ 2000e-5(g)(1), 12117(a); *see* PB26. Because Perich no longer seeks reinstatement, this case presents no occasion for addressing whether she could be reinstated consistent with the Establishment Clause. But the Clause would pose no bar to Perich's reinstatement in any event, and certainly does not prevent an award of money damages.

1. Perich no longer seeks reinstatement. But even if she did, she, like any ADA plaintiff, would be entitled to seek all remedies affecting her employment status, including reinstatement to her position as a school teacher with the same responsibilities and employment benefits. *See Landgraf*, 511 U.S. at 254 (antidiscrimination laws seek to make "persons whole for injuries suffered through past discrimination" (quotation omitted)).

Hosanna-Tabor's concern about "government-appointed clergy" (PB51) is not implicated here. As explained, the historical concern about "government-appointed clergy" involved the government actually ordaining heads of congregations, not applying neu-

tral rules of general applicability to the selection of teachers in a commercial setting. *See supra* at 50-51. Nothing in the history of the Establishment Clause prevents reinstatement of (or money damages to) a teacher such as Perich when her employer violates neutral, generally applicable laws.

2. a. Even if reinstatement would implicate the First Amendment on the facts of this case, that would be no reason to bar other relief, including back pay and front pay (subject to a mitigation requirement, *e.g.*, 42 U.S.C. § 2000e-5(g)), compensatory damages, and attorneys fees. In the context of employment contracts, it has long been the law that "[a] promise to render personal service will not be specifically enforced," but can be enforced through money damages. There is a longstanding distinction between awarding specific performance and damages. Restatement (Second) of Contracts § 367 (1981); *see* Corbin on Contracts § 1204 (2006).

This rule is based, in part, "upon the undesirability of compelling the continuance of personal association after disputes have arisen and confidence and loyalty are gone." Restatement (Second) of Contracts § 367 cmt. a. Accordingly, just as courts for centuries have avoided a reinstatement remedy because it would be "undesirable" after "disputes have arisen and confidence and loyalty are gone," courts can award money damages in lieu of reinstatement when it would be inappropriate to "impose an unwanted" employee on the association. PB37.

Indeed, federal courts already fashion equitable remedies in applying the antidiscrimination laws. Those laws empower courts to "order such affirma-

tive action *as may be appropriate*, which *may include*, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or *any other equitable relief as the court deems appropriate*." 42 U.S.C. § 2000e-5(g)(1) (emphases added). Courts routinely grant front pay in lieu of reinstatement in "cases in which reinstatement is not viable because of continuing hostility between the plaintiff and the employer or its workers." *Pollard*, 532 U.S. at 846; *see, e.g.*, *EEOC v. W&O, Inc.*, 213 F.3d 600 (11th Cir. 2000); *Williams v. Pharmacia, Inc.*, 137 F.3d 944 (7th Cir. 1998). Front pay thus is fully available in situations where a reinstatement remedy would result in a plaintiff "unwanted" by her employer—whether her employer is a private company or a church.

b. Hosanna-Tabor errs in suggesting that awarding back pay and front pay is impermissible because it embodies a judgment that the discharged employee "should have been a minister." PB51. An award of back pay and front pay instead stems from the recognition that the church violated the antidiscrimination laws. While application of those laws in particular circumstances could make it inappropriate to order reinstatement, there is no basis for avoiding an award of back pay or front pay.

Hosanna-Tabor also contends that the mere threat of monetary liability would unduly inhibit its ability to select its ministers because it "would have to be exceedingly cautious about rescinding a call." PB51. Again, however, Hosanna-Tabor would only need to be exceedingly cautious about violating the

antidiscrimination laws where, as here, those laws are constitutional as applied.

3. Finally, and at the very least, even if front pay were unavailable as a monetary substitute for reinstatement, there would still be no categorical bar against a civil court's adjudicating Perich's retaliation claim. Perich also seeks back pay, compensatory damages, and attorneys fees, J.A. 17-18; Pet. App. 73-74a, which are not substitutes for reinstatement.

* * * * *

No one questions Hosanna-Tabor's belief that Cheryl Perich performed important religious functions in her job. But it is similarly beyond question that she performed important secular functions in a commercial setting, and the government has a strong interest in assuring that she and others in her position can do so free of invidious discrimination. Perich asks the federal courts to vindicate her rights under neutral, generally applicable antidiscrimination laws to be free of unlawful retaliation. The First Amendment poses no obstacle to resolution of that claim.

REPLY BRIEF

RECORD
AND
BRIEFS

SEP 1 2011

No. 10-553

In the Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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ARGUMENT

In their merits briefs in this Court, respondents for the first time attack the ministerial exception outright. They have abandoned their arguments below, their briefs in opposition to certiorari, and the Sixth Circuit's opinion, all of which recognized the ministerial exception. They have abandoned the EEOC's Compliance Manual, which has recognized the ministerial exception for two decades. Most important, they have repudiated four decades of unanimously settled law in the lower courts.

They propose instead that courts decide virtually any dispute between a church and its minister. If it is irrelevant whether Perich is a minister, as they say, then any would-be priest, rabbi, pastor, or nun could sue her church on any claim, and juries could overturn religious judgments of fitness for ministry on a preponderance of the evidence. This would be a revolution in relations between church and state.

I. This Court should confirm the ministerial exception.

Respondents' rejection of the ministerial exception is extreme, unprecedented, and unworkable.

A. Respondents repudiate the unanimous judgment of the lower courts and the political branches.

Respondents treat "a so-called 'ministerial exception'" like some strange new doctrine invented by petitioner. Perich 17. But for forty years, the lower courts have unanimously concluded that they cannot decide ministers' employment claims without evaluating ministers and deciding religious disputes. Pet. Br. 16-19. This is not the lower courts' opinion

on an abstract question of law, but their experience-based judgment on what would be required to decide such claims. Longstanding unanimity on such a practical judgment is "entitled to strong consideration." *United States* v. *Tinklenberg*, 131 S.Ct. 2007, 2014 (2011).

Pointing to statutory exemptions and legislative history, including an irrelevant amendment to exempt *all* employees of *all* religious organizations, EEOC 15-18, Perich 24, 44, respondents claim that the "political Branches" have rejected the ministerial exception. EEOC 51.

Not so. When Congress enacted the ADA, the ministerial exception was settled law,[1] and Congress intended to preserve it. The House committee report quoted by the EEOC (at 17-18) expressly endorsed the ministerial exception as a matter of statutory interpretation: "[I]t is the Committee's intent that title I of the ADA be interpreted in a manner consistent with title VII of the Civil Rights Act of 1964 *as it applies to the employment relationship between a religious organization and those who minister on its behalf*." H.R. Rep. No. 101-485(II), at 76-77 (1990) (emphasis added); accord, S. Rep. No. 101-116(I), at 42 (1989).

EEOC Policy Guidance, contemporaneous with enactment of the ADA, also acknowledged the min-

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[1] *E.g.*, *Natal* v. *Christian and Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989); *Rayburn* v. *General Conference of Seventh-day Adventists*, 772 F.2d 1164 (4th Cir. 1985); *McClure* v. *Salvation Army*, 460 F.2d 553 (5th Cir. 1972); *Hutchinson* v. *Thomas*, 789 F.2d 392 (6th Cir. 1986); *Kaufmann* v. *Sheehan*, 707 F.2d 355 (8th Cir. 1983); *Minker* v. *Baltimore Annual Conference*, 894 F.2d 1354 (D.C. Cir. 1990).

isterial exception, relying in part on *Kedroff* v. *Saint Nicholas Cathedral*, 344 U.S. 94 (1952). EEOC Policy Guidance, *Religious Organizations*, 1990 WL 1104706, at *4-5 (1990). The current Compliance Manual continues to recognize the ministerial exception, emphasizing that it "is not limited to ordained clergy."[2]

In short, all three branches have recognized the ministerial exception, without dissent, for decades.

B. Respondents' rejection of the ministerial exception is contrary to history and precedent.

Respondents would distinguish this Court's clergy-selection and entanglement cases into insignificance. They would expand *Employment Division* v. *Smith* to fill the universe of free-exercise doctrine. They rely on self-contradictory theories of freedom of association. Every lower court to consider these cases has rejected respondents' strained interpretations.

1. *Watson*, *Gonzalez*, *Kedroff*, and *Serbian*.

Respondents dismiss *Gonzalez*, *Kedroff*, and *Serbian* as "church-property cases." EEOC 24-28; Perich 45-48. But those cases were about selection of clergy; control of church property was only a derivative consequence. See *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 709 (1976) ("this case essentially involves not a church property dispute, but a religious dispute" over removal of the

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[2] EEOC Compliance Manual, §12-I(C)(2) (2008), http://www.eeoc.gov/policy/docs/religion.html#_Toc203359494; see also *id.* §2-III(B)(4)(b)(i) (2000), http://www.eeoc.gov/policy/docs/threshold.html#2-III-B-4-b-i.

bishop); *Kedroff*, 344 U.S. at 96-97 (right to property depended on which church authority "validly selects the ruling hierarch for the American churches"); *Gonzalez* v. *Roman Catholic Archbishop*, 280 U.S. 1, 18 (1929) ("Since Raul is not entitled to be appointed chaplain, he is not entitled to a living from the income of the chaplaincy.").

These cases do not merely bar courts from choosing "among competing interpretations of Lutheran doctrine." EEOC 24; see Perich 45-47. These cases apply to "matters of *church government as well as* those of faith and doctrine," Pet. Br. 20 (quoting *Serbian* and *Kedroff*), and to "theological controversy, *church discipline, ecclesiastical government, or* the conformity of the members of the church to the standard of morals required of them." *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 733 (1872). Churches may "create tribunals for the decision of controverted questions of faith within the association *and for the ecclesiastical government of all the individual members, congregations, and officers*," and the decisions of those tribunals "should be binding." Pet. Br. 53 (quoting *Serbian* and *Watson*) (all emphases added). This Court repeatedly protected doctrine *and* governance; respondents pretend it mentioned only doctrine.

These cases were not repudiated or reinterpreted in *Jones* v. *Wolf*, 443 U.S. 595 (1979). Cf. EEOC 26-28. That case *was* just a church property dispute—between two factions of laypeople and not between an intact church and an individual demanding to be its minister. Far from repudiating *Serbian* or *Watson*, *Jones* relied on them. 443 U.S. at 602-04. *Jones* was decided the same term as *NLRB* v. *Catholic*

Bishop, 440 U.S. 490 (1979), which protected decisions concerning teachers in religious schools. *Jones* says that courts can apply neutral principles of law only if they can do so without deciding questions of "religious doctrine *or polity*." 443 U.S. at 602 (emphasis added). It does not redefine what counts as a religious question.

Respondents emphasize *Jones*'s dictum that neutral principles of law apply to the manner in which churches "hire employees." EEOC 27; Perich 43. The Church has never disputed that as a general matter. The ministerial exception is confined to a unique category of employees not at issue in *Jones*.

Respondents also dismiss this Court's cases as not involving neutral and generally applicable statutes. EEOC 24-25. But in each case, lower courts applied neutral principles of law. *Avery* v. *Watson*, which later became *Watson* v. *Jones*, 80 U.S. at 687, 732-34, applied "rights of property *** as in ordinary cases of injury resulting from the violation of a contract." 65 Ky. 332, 349 (1867). *Gonzalez* involved enforcement of a trust, 280 U.S. at 16, and the Philippine trial court treated decedent's will as "the supreme law to be observed," *Gonzalez* Record 230, 277. *Kedroff*, on remand, applied principles governing "the conduct of trustees" to determine who would faithfully execute the trust. 114 N.E.2d 197, 201-02 (N.Y. 1953). This Court reversed. *Kreshik* v. *Saint Nicholas Cathedral*, 363 U.S. 190 (1960). *Catholic Bishop* exempted religiously sensitive positions from a generally applicable statute. 440 U.S. 490.

In *Serbian*, the lower court applied principles of contract and "rights of members in an association." 328 N.E.2d 268, 283-84 (Ill. 1975). The dissent in

this Court argued that the Illinois courts resolved the dispute "just as they would have attempted to decide a similar dispute among the members of any other voluntary association." 426 U.S. at 726 (Rehnquist, J., dissenting). Justice O'Connor later explained that the *Serbian* line of cases involved "the application of otherwise neutral property or contract principles to religious institutions." *Board of Education* v. *Grumet*, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring).

Respondents' reasoning tracks the reasoning rejected in these cases. These lower courts thought they were righting wrongs; they took narrow views of what counts as a religious question; and they concluded that they were not deciding any religious dispute beyond their authority. This Court rejected these holdings, because the lower courts had interfered in the churches' self-governance or selection of ministers. Neutral principles of law cannot be applied to resolve religious disputes.

2. Free exercise.

Citing *Employment Division* v. *Smith*, 494 U.S. 872 (1990), respondents say the ADA is a generally applicable law that can be applied even to the selection of ministers. EEOC 21-24; Perich 42-43.

But *Smith* preserved a longstanding distinction between internal church governance, including selection of ministers, and conscientious objection to general regulation. These two kinds of free-exercise claims have been doctrinally distinct in this Court since the 1870s. Pet. Br. 25-26. They have been conceptually distinct since the writings of John Locke, who supported the principles underlying both

Smith and the ministerial exception. International Mission Board Brief 25-27. And they have been distinct in the lower courts: Eleven circuits have rejected respondents' reading of *Smith*. Pet. Br. 17, 23-24.

Smith says that government cannot take sides in "controversies over religious authority *or* dogma." 494 U.S. at 877 (citing *Serbian* and *Kedroff*) (emphasis added). Respondents pretend the Court mentioned only "dogma"; they repeatedly equate religious disputes with disputes over religious *doctrine*. Perich 44-45, 52; EEOC 23, 25-26, 27, 32, 35-36, 37, 38, 42.

This argument is wrong at multiple levels. Ministers occupy positions of religious authority, so a dispute over who should be a minister is necessarily a controversy over "religious authority." Pet. Br. 23. Courts cannot decide such disputes even if they somehow avoid theological questions. *Supra* 4-6. Either the church picks the minister or the court does.

This case is also a dispute over religious doctrine. Disputes over *application* of religious doctrine are as much doctrinal disputes as disputes over broad statements of religious principle. Perich says she is fit for ministry; the Church says she is not. On either characterization—doctrine or authority—the government cannot take sides in this dispute.

3. Establishment.

a. Respondents do not deny that "government-appointed ministers were one of the quintessential features of the established church." Perich 50. They cannot distinguish this history.

First, Perich says that "literally" appointing ministers is different from reinstating ministers or regulating the grounds on which they can be fired. Perich 50-51. But government-appointed ministers would not have been a problem if churches could just fire them. They could not. See Pet. Br. 27 (Virginia); *Avery* v. *Inhabitants of Tyringham*, 3 Mass 160, 181-82 (1807) (holding that minister could be removed only for cause, and that except for teaching false doctrine, the court was the judge of cause). Government limits on firing ministers were a necessary element of establishment.

Second, Perich claims there were no historical concerns with "application of a neutral law" to churches. Perich 51. But the Massachusetts court restricted the discharge of ministers pursuant to the law of contract; *Avery* was a suit in assumpsit. 3 Mass. at 160. And in 1875, Congress specifically refused to apply "neutral" public accommodations laws to churches, concluding after substantial debate that churches have a constitutional right to decide "with whom they will worship." Evangelical Covenant Church Brief 20-24.

Finally, Perich suggests that religion teachers are different from "clergy." Perich 50-51. But the 1875 debate was over members, not just clergy. And much of the founding-era debate over disestablishment explicitly included pastors and "*religious teachers*." Evangelical Covenant Church Brief 15 (collecting constitutions).

Amicus National Employment Lawyers Association claims that courts have decided many employment disputes regarding ministers. Several of NELA's cases, including the one they quote most

frequently, involved established churches with government-appointed ministers. *Avery*, 3 Mass. 160. (Massachusetts' establishment was not repealed until 1833. See sources cited at Pet. Br. 28.)

Most of NELA's cases were contract or property disputes, decided on the basis of legal documents signed by the church, as in *Jones* v. *Wolf*, 443 U.S. 595. When a church signs a contract written in secular language, the contract can be enforced unless the basic dispute is entangled in religious questions. So, for example, a contract claim challenging discharge for cause generally cannot proceed, but a contract claim for unpaid salary or benefits generally can. Such secular contract claims have always coexisted with the ministerial exception. See *Petruska* v. *Gannon University*, 462 F.3d 294, 310 (3d Cir. 2006); *Minker*, 894 F.2d at 1358-61 (both distinguishing secular contract claims from discrimination claims). Courts in some of NELA's cases decided questions they should not have reached, but such cases are why this Court decided *Watson*, *Gonzalez*, *Kedroff*, and *Serbian*.

b. Respondents claim that *Ohio Civil Rights Commission* v. *Dayton Christian Schools*, 477 U.S. 619 (1986), authorizes courts to decide claims of religious pretext. *Dayton* held no such thing. As already explained, Cert. Reply 9-10, *Dayton* held only that "the District Court should have abstained from adjudicating this case under *Younger* v. *Harris*," notwithstanding any "constitutional attack on state procedures themselves." 477 U.S. at 625, 628. The Court expressly left the merits to the state proceedings. *Id.* Moreover, there is no indication

whether the employee was a minister, under petitioner's test or any other.

The Court addressed the pretext issue in *Catholic Bishop*. Respondents would limit *Catholic Bishop* to "comprehensive oversight of a religious institution," EEOC 40 n.10, see Perich 57, but that was only part of the holding. The Court also said that an "inquiry into the good faith of the position asserted by the clergy-administrators"—*i.e.*, a pretext inquiry—"presents a significant risk that the First Amendment will be infringed." 440 U.S. at 502.

Perich argues that rules against entanglement have "changed considerably" since *Catholic Bishop*, citing cases on funding the secular functions of religious schools. Perich 57-58, 53. But this case is not about a neutral funding program that defers to private choices. This case is about institutional separation—the least controversial core of separation of church and state. Eugene Volokh Brief 5-27. The government cannot control the internal affairs of churches any more than churches can control the institutions of government.

4. Freedom of association.

Respondents claim that freedom of association is both so strong that it single-handedly protects the male-only clergy, EEOC 31-32, Perich 35-36, and so weak that it is irrelevant to this case, EEOC 29-31, Perich 28-35. They cannot have it both ways.

a. Eliminating the ministerial exception would make many religious requirements for ministry illegal—including male-only rules, ethnicity rules, and celibacy rules. Pet. Br. 18. Respondents attempt to preserve the all-male clergy with the exception for

bona fide occupational qualifications, EEOC 31, Perich 36 n.9, or with freedom of association, EEOC 31-32, Perich 35-36. Neither argument works.

The BFOQ exception is "extremely narrow." *Dothard* v. *Rawlinson*, 433 U.S. 321, 334 (1997); accord, *UAW* v. *Johnson Controls*, 499 U.S. 187, 200-07 (1991). Without an assist from the First Amendment, the male-only clergy is simply a discriminatory rule announced by the employer. Nor does the BFOQ exception apply to ethnicity rules, such as those in some strands of Judaism, Islam, and Hinduism. There are good reasons why neither respondent commits to its BFOQ argument.

Alternatively, respondents say the male-only clergy could survive under *Boy Scouts* v. *Dale*, 530 U.S. 640 (2000), because appointing a woman would undermine teachings that only men can serve as priests or rabbis. EEOC 31; Perich 36. So it would. But a ruling for Perich would equally undermine the Church's teaching that ministers should resolve religious disputes within the church.

Respondents cannot distinguish the two teachings. They say the male-only clergy is "deeply embedded and long-standing," EEOC 31, but so is the teaching on internal resolution of disputes over ministry. It is based on explicit Scripture, developed in formal theological teachings, and implemented in an elaborate dispute-resolution process. Pet. Br. 7-8, 54-55; LCMS Brief 16-24. The male-only priesthood may be more familiar to non-members, and respondents may be afraid to attack it, but these are not legally cognizable distinctions.

b. Nor can respondents distinguish *Dale*. It is undisputed that Perich was the primary means by which the Church communicated its faith to her students, Pet. Br. 40-41, that the Church teaches that disputes over ministry should be resolved within the church, and that Perich violated this teaching.

If Perich were reinstated, every parent and child in this small school would know that she got there by defying the Church's teaching. Having defied that teaching, she could not credibly teach that religious obligation or any other. The Church's message would be undermined, especially to its internal audience, at least as severely as anything at issue in *Dale*.

All nine Justices agreed that freedom of association can justify exemption from civil-rights laws if an organization has a clear message "inconsistent with a position advocated or epitomized by the person whom the organization seeks to exclude." *Dale*, 530 U.S. at 686-87 (Stevens, J., dissenting). The disagreement was whether the Boy Scouts had such a message. It is undisputed that Hosanna-Tabor does. Its teaching on internal dispute resolution is far more developed and clearly stated than the Boy Scouts' disapproval of homosexuality. See *id.* at 666-78.[3]

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[3] Perich relies on irrelevant cases about students and professors with no role as spokespersons for their schools. Perich 28-31 (citing *University of Pennsylvania* v. *EEOC*, 493 U.S. 182 (1990); *Runyon* v. *McCrary*, 427 U.S. 160 (1976)). Academic freedom means that secular universities disclaim responsibility for what their professors say. The University of Pennsylvania had no relevant message and did not argue freedom of association.

This case is also stronger than *Dale* because, as *Smith* anticipated and respondents concede, freedom of association is "reinforce[d]" by free-exercise concerns. EEOC 31-32; Perich 48; see Pet. Br. 36; *Smith*, 494 U.S. at 882. Freedom of religious association is based not only on freedom of expressive association, but also on free exercise and separation of church and state. All these rights are at their maximum when churches evaluate ministers.

5. Compelling interest.

Respondents claim that these constitutional rights are overridden by the government's compelling interest in eliminating discrimination. EEOC 30-31; Perich 22-24. But compelling interest depends on context. *Gonzales* v. *O Centro Espirita*, 546 U.S. 418, 431-32 (2006). Here, the context is selection of ministers. Claims of discrimination in selection of ministers are necessarily claims that churches applied impermissible criteria, or misapplied acceptable criteria, to inherently religious decisions. The government can have no compelling interest in a church's criteria for choosing ministers. This is simply a matter beyond the authority of government—as Perich concedes with respect to the clergyman in *Kedroff*. Perich 49. The government has no greater interest in who teaches religion at Hosanna-Tabor.

The government's interest in *secular* education at Hosanna-Tabor does not require regulation of religion teachers. The Church may discharge a minister it considers unfit, even if she also teaches secular subjects. But her replacement must satisfy the secular standards required by law for teachers of those secular subjects. This case turns on the gov-

ernment's alleged interest in the criteria for choosing religion teachers; that interest is nil.

C. Respondents' rejection of the ministerial exception is unworkable.

Under respondents' approach, *every* claim by *every* minister can be resolved on the merits, subject only to respondents' inconsistent views of expressive association and modest limits on admissible evidence. EEOC 35-42. This "solution" would be deeply entangling and wholly unworkable.

1. The EEOC posits four types of cases:

   a. *No-religious-reason cases*, where the church "proffers no religious reason for the employee's termination." EEOC 36-37.
   b. *Prohibited-religious-reason cases*, where the church's religious reason is illegal. EEOC 37-38.
   c. *Pretextual-religious-reason cases*, where the minister claims "that the religious reason was pretextual." EEOC 38-40.
   d. *Disputed-religious-reason cases*, where the minister offers direct evidence to dispute the church's religious reason. EEOC 40-41.

According to the EEOC, courts can decide cases in the first three categories without entanglement, but the final category would pose a "risk" of entanglement. EEOC 40. In fact, all the categories run together, and all pose intractable religious questions.

The distinction between pretextual- and disputed-religious-reason cases is illusory. Both are about pretext, differing only in the evidence. Take the EEOC's example of a disputed-religious-reason case, in which a church discharges a minister for being

"insufficiently spiritual." EEOC 40. The EEOC admits that the minister could not show pretext by offering evidence of how spiritual he really was, because that would require the courts to weigh evidence for and against "the religious organization's religious assessment." EEOC 41.

But the same problem occurs in pretextual-religious-reason cases. There, the minister offers less direct evidence of pretext—suspicious remarks by the bishop, inconsistent treatment of another minister allegedly lacking in spirituality, *etc.* But the church's best evidence will still be evidence of how unspiritual the minister was. Either the court would have to ignore that evidence, depriving the church of the right to defend itself, or it would have to evaluate that evidence and weigh it against the minister's pretext evidence, thus "entangling the court in religious questions beyond its adjudicative capacity." EEOC 41; accord, Perich 54-55 ("inherently religious determination outside the ken of a civil court").

This is why the lower courts have overwhelmingly agreed that they cannot adjudicate a minister's pretext claim. Pet. Br. 57-58. Respondents cite two cases allegedly to the contrary, EEOC 42, but as already documented, these cases did not involve ministers. Pet. Br. 59.

The EEOC's prohibited-religious-reason cases are also entangling. At the heart of these cases is a dispute over the qualifications for ministers. The church says that a particular characteristic is essential—*e.g.*, maleness, celibacy, theological training, moral virtue, or willingness to resolve disputes within the church. Plaintiff claims that she is qualified without that characteristic. Respondents would

have the courts resolve this religious dispute against the church by ignoring it. Government would dictate to the church what are the legitimate qualifications for ministry.

Beyond that, prohibited-religious-reason cases present further entangling issues. Here, respondents argue that the religious reason is not only prohibited, but also pretextual. Perich 34-35. And the Church offers an additional religious reason that is not prohibited: it might have rescinded Perich's call for insubordination even if she had not threatened to sue. J.A. 55. Finally, a minister who publicly violates church teaching destroys her credibility and becomes ineffective, giving rise to still another religious reason for the Church's decision. Prohibited-religious-reason cases thus become pretextual-religious-reason cases and mixed-motive cases.

The rare and mostly theoretical no-religious-reason cases also lead to entanglement. Requiring churches to state a religious reason to invoke the ministerial exception would lead courts to evaluate that reason. Is it really religious? Is it really the reason? Is it pretextual? Plaintiffs would argue that many religious reasons are not really religious, just as respondents argue that few disputed questions are religious. Such entanglements would arise far more often than true cases of no religious reason. More fundamentally, the lower courts have properly viewed decisions about ministers as "*per se* religious matters." *Petruska*, 462 F.3d at 304 n.7; see Pet. Br. 24-25.

If a church ever dismisses a minister for stated reasons wholly unrelated to religion, the Court can consider whether to make an exception. But no such

issue is presented here; the Church's explicitly stated reason is firmly rooted in religious teaching.

2. The EEOC's fallback position is that any ministerial exception should be limited to "those employees who perform exclusively religious functions" and have "no secular equivalent." EEOC 51. This is an empty category.

No ministers have "exclusively" religious functions. Pastors manage church finances, supervise personnel, maintain buildings, and solicit contributions. All these tasks have secular equivalents. The more senior a minister becomes, the more he is burdened with administration. Under the EEOC's test, even a bishop is not a minister: He supervises the property and finances of the diocese like a corporate CEO.

3. In the end, because respondents view religious functions and ecclesiastical office as irrelevant, EEOC 48, Perich 45, 61, they would let all clergy sue their churches. And because respondents think that hardly any question is religious, these clergy could pursue any claim, with at most some limit on the evidence they could offer.

A Catholic priest dismissed for poor performance and lack of commitment could sue his bishop. *Rweyemamu* v. *Cote*, 520 F.3d 198 (2d Cir. 2008). A nun could sue the Pontifical University that denied her tenure as a canon-law professor. *EEOC* v. *Catholic University*, 83 F.3d 455 (D.C. Cir. 1996). A rabbi could sue the temple that judged her performance unacceptable. *Friedlander* v. *Port Jewish Center*, 588 F. Supp. 2d 428 (E.D.N.Y. 2008). White males could claim they were passed over because of affirmative

action.[4] Respondents do not deny that they would open the door to class actions alleging disparate impact and statistical underrepresentation. Pet. Br. 32; see Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. Rev. ---, part V.B. (forthcoming 2011), http://ssrn.com/abstract=1883657.

In all these cases, judges and juries would evaluate ministers' religious qualifications or job performance and churches' religious reasons for decisions. Such a regime would drag courts into religious disputes and have disastrous effects on churches.

II. The ministerial exception has a workable scope.

Based on this Court's cases, as interpreted by four decades of settled lower-court precedent, petitioner has argued that the ministerial exception is limited to plaintiffs who perform important religious functions or hold ecclesiastical office, Pet. Br. 37-50, and to claims that seek reinstatement or would require the court to decide religious questions, including questions about plaintiff's qualifications or job performance. *Id.* at 50-59. Respondents attack the ministerial exception as too broad, too entangling, or too horrible in its consequences.

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[4] For illustrative affirmative-action commitments, see Presbyterian Church (U.S.A.), *Book of Order* §G-9.0104a, http://oga.pcusa.org/boo/fog_ch9.htm; Episcopal Church (U.S.A.), *Journal of the General Convention of the Episcopal Church 1985*, at 133, http://www.episcopalarchives.org/cgi-bin/acts/acts_resolution-complete.pl?resolution=1985-C023.

A. The ministerial exception is neither overbroad nor entangling.

1. Underlying many of respondents' criticisms is the notion that the ministerial exception is an overly "broad," "categorical," and "prophylactic" "immunity," inconsistent with case-by-case resolution of constitutional questions. They use these four labels fifty-eight times. This labeling exercise is neither illuminating nor accurate. Respondents opposed certiorari on the opposite ground—that ministerial-exception cases require a "fact-intensive inquiry." EEOC BIO 16-17; see *id.* at 12, 19-20, Perich BIO 19.

The ministerial exception defines a narrow category of cases. Some cases will be easy—pastors or rabbis dismissed for poor job performance. Cases close to the line will indeed require a "fact-specific inquiry." *EEOC* v. *Roman Catholic Diocese*, 213 F.3d 795, 801 (4th Cir. 2000).

2. An important-religious-functions approach does not make nearly everyone a minister. Cf. EEOC 49; Perich 38-39, 41-42. Courts have emphasized religious duties for forty years, and they say "no" when churches overreach—as shown by respondents' only example of alleged overreaching. EEOC 49; Perich 41 (both citing *EEOC* v. *Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981)). *Southwestern Baptist* held that support staff, physical-plant staff, and non-academic administrators of a seminary are not ministers. *Id.* at 284-85.

Respondents also cite cases holding that many teachers in religious schools are not ministers. Perich 26 n.8; EEOC 53 (citing Pet. App. 17a-18a). But this only proves our point. When teachers taught

only secular subjects, or had only incidental religious duties, lower courts excluded them from the ministerial exception. Cert. Reply 5-6. Teachers who teach religion, lead worship, and lead prayer are a different matter.

3. Respondents say that the ministerial exception applies to too many kinds of claims. Four decades of experience show that that is not true either.

First, the ministerial exception applies only to suits *by ministers* (or suits on their behalf, like the EEOC complaint here). Pet. Br. 15. It does not apply to suits by third parties, even if they allege wrongdoing by a minister and negligent hiring or supervision by a church. So tort claims against ministers and churches go forward.

Second, because the exception applies only to suits by ministers, it does not apply to criminal prosecutions, EEOC 47, or to laws that limit the pool of eligible employees to qualified teachers, lawful immigrants, or adults. Immigration and child labor laws remain untouched. Cf. EEOC 29. In terms of interference with religious decisions, such general regulation of the labor pool is not remotely comparable to evaluating a minister's qualifications or job performance or imposing an unwanted minister on a church.

Third, even many suits by ministers go forward. Contract claims go forward when they do not turn on religious questions. *Supra* 9. Tort claims, such as those arising from unsafe working conditions, go forward. *Rweyemamu*, 520 F.3d at 208. Sexual-harassment claims, when separable from a claim of entitlement to a ministerial position, go forward.

Elvig v. *Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004). The claims that are barred are those that challenge a church's right to hire, fire, evaluate, or make rules for its own ministers.

4. Respondents claim it is inappropriate to apply the ministerial exception to schools. EEOC 52-53; Perich 32. Perich describes the Church's school as "commercial"—some twenty-nine times. This argument misstates the law and mischaracterizes religious schools.

The ministerial exception applies to "religious institution[s]," not secular businesses. Pet. App. 16a-17a. Hosanna-Tabor clearly qualifies. *Ibid.* Its school has never even been separately incorporated. Pet. Br. 3. A religious nonprofit does not become "commercial" the minute it charges a fee for service. See *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. 327, 337 (1987) (rejecting "commercial" characterization as applied to nonprofit organization). Religious schools have long received constitutional protection alongside churches. *Catholic Bishop*, 440 U.S. 490.

Respondents' "commercial" label also misunderstands schools that impose important religious duties on their teachers. Schools like Hosanna-Tabor's exist to transmit the faith to children already in the church and to share the faith with interested newcomers. That is why Hosanna-Tabor runs a school, why it carries on despite deficits, Pet. Br. 3 n.1, and why it subsidizes the school with church funds and member contributions.[5]

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[5] Perich's claim that "80% of the funding for LCMS schools came from tuition," Perich 3, is both irrelevant and mistaken.

Hosanna-Tabor's school is a religious enterprise and not merely "a substitute for compulsory public education." Perich 32. Not even respondents claim that government could regulate the content of the religious curriculum directly. But they would regulate that content indirectly, dictating that teachers who flout it can still teach it. The government can regulate the school's secular functions, but it can and must do so without regulating the selection of ministers. *Supra* 13-14.

5. Respondents also claim that the ministerial exception is entangling. EEOC 48-49; Perich 56. But it is far less entangling than respondents' invitation to probe deeply into every case and decide as much as possible. Under the ministerial exception, most cases are easy. Bishops, priests, rabbis, pastors, assistant pastors, theology professors, church governance officials, and full-time religion teachers are obviously covered if they challenge a church's evaluation of their job performance. Janitors, secretaries, accountants, and bus drivers are obviously not covered. Even this case is easy: Respondents no longer deny that Perich performed important religious functions and held ecclesiastical office. Perich 45, 61.

If respondents are serious about preserving any limitations on what courts can decide, then all these cases become difficult under their approach. The court must evaluate the arguments each side plans

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This is the figure for pre-schools. LCMS, *Lutheran School Statistics* 2 (2004), http://classic.lcms.org/graphics/assets/media/dcs/04-05schlstats.pdf. For elementary schools, 48% comes from tuition and fees, *42% comes from the congregation's budget*, and 10% comes from "other." *Id.*

to make, and even what evidence plaintiff plans to introduce. EEOC 41; Perich 54. The court must resolve disputes over the nature of each side's arguments and over what questions are religious. Parts of the case could go forward and parts, perhaps, could not.

In the end, if respondents' narrow view of what counts as a religious question prevails, all cases would reach the merits. Courts would be deciding questions that are religious in fact and religious under this Court's precedents. *Supra* 4-6, 10, 14-17. They would be dictating to churches who will perform important religious functions.

B. The ministerial exception applies to retaliation claims.

Finally, respondents claim that the ministerial exception should not apply to retaliation claims. EEOC 42-47; Perich 39-40. But no court has treated retaliation claims differently,[6] and with good reason.

1. In any gradually escalating dispute, retaliation is easy to allege. Once a minister makes any comment about discrimination, any adverse employment action that follows might be retaliatory. He cannot be terminated, suspended, or moved to a less sensitive

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[6] *Petruska*, 462 F.3d at 307-08 & n.11; *Roman Catholic Diocese*, 213 F.3d at 798-99; *Starkman* v. *Evans*, 198 F.3d 173, 174-75 (5th Cir. 1999); *Alicea-Hernandez* v. *Catholic Bishop*, 320 F.3d 698, 700 (7th Cir. 2003); *Elvig*, 375 F.3d at 965; *Gellington* v. *Christian Methodist Episcopal Church*, 203 F.3d 1299, 1300-01 (11th Cir. 2000); *Catholic University*, 83 F.3d at 457; *Van Osdol* v. *Vogt*, 908 P.2d 1122, 1125-34 (Colo. 1996); *Pardue* v. *Center City Consortium Schools*, 875 A.2d 669, 673 (D.C. 2005); *Williams* v. *Episcopal Diocese*, 766 N.E.2d 820, 821-22 (Mass. 2002).

position without risking a retaliation claim. Retaliation is a broad concept. *Thompson* v. *North American Stainless*, 131 S.Ct. 863, 868 (2011). If retaliation claims are outside the ministerial exception, plaintiffs will plead every case as a retaliation claim.

Retaliation claims present the same problems as other employment claims by ministers: Plaintiff claims she was a victim of retaliation; the church claims she was a bad minister. A jury cannot resolve that dispute without assessing the minister's religious performance.

Here, respondents' retaliation claim is also an attack on the Church's rules for ministers. Perich violated Church teaching and was found unfit for ministry; that religious teaching is "an independent and adequate ground" for an employment decision. *Schleicher* v. *Salvation Army*, 518 F.3d 472, 474 (7th Cir. 2008). Perich now challenges that teaching as illegitimate. To resolve that claim, the court must assess the effect of flouting church teaching on the minister's continued effectiveness and "explore the doctrines of the [church] that define the role of its ministers." *Ibid.*

2. There is nothing extreme about the Church's teaching that ministers have to resolve disputes over fitness for ministry within the church. Secular employers may require *all* employees to arbitrate discrimination claims. *14 Penn Plaza* v. *Pyett*, 556 U.S. 247 (2009); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Respondents have no answer to the much older and narrower rule that churches may "create tribunals *** for the ecclesiastical government of *** [their] officers." Pet. Br. 53 (quoting *Serbian* and *Watson*). The two procedures

are not identical, but they are similar. Each limits access to the courts, which is what respondents find so shocking. The Synod's dispute-resolution procedure is independent of the employer (the local church), guarantees procedural fairness, and mandates unbiased panel members. Pet. App. 76a-104a; LCMS Brief 16-24; see Religious Tribunal Experts Brief (discussing other traditions).

3. Respondents' parade of horribles, from OSHA complainants to grand jury witnesses, EEOC 44-47, Perich 39-40, has not happened. The ministerial exception has been the law for forty years, but respondents offer almost no examples of the consequences they fear. They cite *no* examples of retaliation for reasonable-accommodation complaints, OSHA complaints, or for testifying in criminal proceedings—all are purely hypothetical. EEOC 44-47; Perich 39-40.

Moreover, barring retaliation claims by ministers does not prevent the government from pursuing its legitimate interests. This is illustrated by the only two examples respondents cite.

The EEOC's example is a sexual-harassment claim, EEOC 45, which the court treated as a tort that is separate from the employment decision. *Elvig*, 375 F.3d at 960. Thus, while a minister claiming sexual harassment cannot challenge her termination, she has powerful remedies for the harassment itself: damages for emotional distress and loss of reputation, punitive damages, and attorneys' fees, 42 U.S.C. §1981a (2006), similar remedies under state laws, and tort claims for assault or intentional infliction of emotional distress.

The same is true in Perich's example of a minister allegedly fired for reporting possible sexual abuse. Perich 40 (citing *Weishuhn* v. *Catholic Diocese*, 787 N.W.2d 513 (Mich. Ct. App. 2010)).[7] The government can criminally prosecute the abuser, impose tort liability on the abuser, impose tort liability on the church for negligent supervision, and make evidence of retaliation or other cover-up admissible in the tort case. It can impose mandatory reporting requirements. It can prosecute individual retaliators under the laws cited at EEOC 47, or for obstruction of justice. It can create many remedies; what it cannot do is give a minister a claim to be hired or retained as a minister. Retaliation claims are never the only way to pursue the government's interest; they are only one possibility among many.

4. Nor is a bar on some claims or remedies unique to the ministerial exception. Many claims and remedies are barred because the resulting litigation would be too problematic or too threatening to other constitutional values. Familiar examples include governments' power to retaliate against their employees' speech, *Garcetti* v. *Ceballos*, 547 U.S. 410 (2006), the actual-malice rule in defamation, *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), and the absolute immunity of judges and prosecutors, *Van de Kamp* v. *Goldstein*, 129 S.Ct. 855 (2009). Respondents can imagine hypotheticals that seem easy, but "the easy cases bring difficult cases in their wake." *Id.* at 864. Within the scope of the ministerial exception, nearly

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[7] The facts in *Weishuhn* do not match Perich's description. Compare Perich 40 with Brief in Opposition 3-6, *Weishuhn*, No. 10-760. Many incidents and parent complaints culminated in plaintiff's dismissal. The alleged abuser was unconnected with the school, so the school had no reason not to report him.

all the cases would be hard, because they turn on religious judgments about the qualifications and job performance of ministers.

5. Finally, respondents' hypotheticals are easily distinguished. Respondents fear two things: retaliation for filing claims that fall outside the ministerial exception (such as sexual harassment or OSHA), and retaliation for reporting wrongdoing directed at third parties. But if either scenario were ever to become a serious problem, the Court could allow those categories of retaliation claims to proceed. Such a rule would have substantial costs, because the resulting retaliation claims would raise the same problems as other ministerial-exception cases. But it would solve respondents' fears for third parties and for claims outside the ministerial exception.

These issues are not presented here. Perich's threatened disability complaint falls squarely within the ministerial exception and has nothing to do with third parties. Even if there were separate rules for these other sets of cases, her retaliation claim would still fall within the exception.

III. Perich's suit is barred by the ministerial exception.

A. Perich performed important religious functions and held ecclesiastical office.

Perich now concedes that she performed important religious functions and held ecclesiastical office. Perich 45, 61. The EEOC does not dispute it. Rather than challenging these points directly, respondents try to undermine them indirectly, repeatedly pointing out that contract teachers and called teachers

performed the same duties. *E.g.*, EEOC 33; Perich 45.

Respondents ignore the undisputed fact that contract teachers were hired only if no called teachers were available. Pet. Br. 39-40. Perich identified only one contract teacher at Hosanna-Tabor, who taught for only one year. J.A. 225. Perich was hired as a contract teacher for less than a year and only in the final stages of completing preparation for her call. Pet. App. 3a. Entrusting important religious functions to these occasional contract teachers does not show that the religious functions were unimportant, or that an important-religious-functions standard is overbroad. And Perich's ecclesiastical office makes her an a fortiori case.

In the Synod as a whole, contract teachers are more numerous. Perich 5. This is because Synod schools face a shortage of synodically-trained teachers.[8] Whether these difficulties have changed the roles of called and contract teachers at other Synod schools is not a question presented here. At Hosanna-Tabor, the preference for called teachers remains strong.

B. Perich seeks reinstatement or its financial equivalent.

Respondents also seek unconstitutional remedies. Both complaints demand reinstatement, Pet. App. 73a, J.A. 17, which results "in government appointment of ministers over the objections of churches." Pet. Br. 28.

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[8] See Commission on Ministerial Growth and Support, *Teaching 2000 Survey* 1, http://classic.lcms.org/graphics/assets/media/CMGS/qualreport.pdf.

The EEOC now concedes that "reinstatement may pose entanglement concerns." EEOC 33. Perich now announces that she "no longer seeks reinstatement." Perich 21. These retreats suggest doubts about the full implications of respondents' doctrinal claims.

Perich also claims that she never sought reinstatement "of her religious status as 'called.'" Perich 15. This is inaccurate. Both complaints sought reinstatement "*to the position from which she was terminated* with pay and benefits equal to that which she would have attained had she not been terminated." Pet. App. 73a, J.A. 17 (emphasis added). That "position" was called teacher and commissioned minister, which has different status, tenure, and "benefits" from the position of contract teacher.

Respondents still demand back pay, front pay, damages for emotional distress, punitive damages, and attorneys' fees. EEOC 34-35; Perich 59-61; J.A. 17-18; Pet. App. 73a-74a. Some of these remedies are the exact monetary equivalent of reinstatement, calculated by the value of the job. All these remedies depend on the forbidden judgment that Perich was entitled to remain in her ministerial position. Some of these elements of recovery are highly subjective, and in Michigan, there is no cap on the liability of small employers. Compare 42 U.S.C. §1981a with Mich. Comp. Laws §37.1606 (West 2001).

A large judgment for damages or attorneys' fees would destroy this financially struggling church and others like it. Fear of such liability would effectively deprive many churches of the right to discharge a minister, no matter what he did. Pet. Br. 51-52. Half the churches in America have 50 or fewer regularly participating adults. Mark Chaves, *Congregations in*

America 18 (2004). And churches with only one employee are subject to Michigan employment-discrimination laws. Mich. Comp. Laws §37.1201(b), §37.2201(a) (West 2001).

Perich says churches need only avoid violating the discrimination laws, Perich 60-61, but that is naïve. The preponderance-of-the-evidence standard tolerates a 49% error rate, and employer state of mind is difficult to assess. A church's teachings, practices, and vocabulary will often be unfamiliar to judges and juries, who may be skeptical or even hostile. If these cases go forward on respondents' view that courts should just ignore many of the religious questions, then the church's reasons for decision will be ignored, discounted, or distorted into some secular analog. In such a legal environment, no church can assume that it will be vindicated if it just refrains from discrimination. Some churches will act badly on occasion, but under respondents' proposal, many more churches will be entangled in high-risk litigation for acting on religious judgments about their ministers.

C. Perich's claim would entangle the courts in religious questions.

The fundamental question in this case is whether Perich was entitled to her ministerial position. The highest church authority to consider the question decided that she was not. Perich now seeks a court order overturning that determination. This is an inherently religious question. *Supra* 15.

This religious question raises subsidiary religious questions: Did the congregation rescind her call because she defied church teaching? Could she be

effective at Hosanna-Tabor after doing so? Would the congregation have rescinded her call anyway, for insubordination? These are questions about religious authority, the application of religious doctrine, and the congregation's religious reasoning. Respondents claim that courts can ignore these questions and simply override the Church's religious reasons under *Smith*. But *Smith* said that courts cannot take sides in "controversies over religious authority." *Supra* 6-7.

Respondents raise additional religious questions by insinuating pretext. They claim that the Church did not invoke its religious reasons soon enough, EEOC 42, Perich 34-35, that it did not discipline Perich harshly enough, Perich 34, that its teaching is not absolute enough, Perich 33-34, that it does not discriminate enough, EEOC 4, Perich 18, and that two closely related and cumulative reasons for rescinding Perich's call were somehow inconsistent, EEOC 41. All of these assertions are apparently intended to imply that the Church did not really have a religious reason for rescinding Perich's call.

Respondents argue these points only implicitly; spelling out their arguments would clearly raise religious questions. For example, respondents' repeated claim that the teaching on dispute resolution was not invoked soon enough rests on implicit assertions about the teaching—that it does not apply to Perich, or that it was so obscure that she couldn't know what the Church was talking about. The Church told Perich exactly what she had done wrong; there was no more need to explain the underlying rule than if she had been discharged for drunkenness. Pet. Br. 58.

Perich's claim that she didn't know about the dispute-resolution policy, EEOC 8, Perich 15, is not remotely credible. She was a lifetime Lutheran, with eight courses in Lutheran theology and eleven years in Lutheran schools. Pet. Br. 5, 44. But even if she were unaware, that would be irrelevant. Like "[a]ll who unite themselves" to a religious body, she did so "with an implied consent to [its] government." *Watson*, 80 U.S. at 729.

Another example is Perich's claim that she remained "on the LCMS roster." Perich 34. This argument, too, rests on implicit religious assertions—that violation of church teaching must lead to removal from the roster and that Hosanna-Tabor had authority to remove her. These implicit assertions are mistaken. The very bylaw cited by Perich (at 14) indicates that individuals can remain on the roster even when they have "unresolved issues involving fitness for ministry."[9] Hosanna-Tabor had no authority to remove Perich from the Synod's roster, no authority to decide Perich's fitness for other congregations, which issue their own calls, and no religious reason to do more than it did.

The larger point is that courts should not be resolving these religious disputes at all—much less resolving them against the Church on the basis of misleading insinuations.

D. Respondents pleaded no disability claim.

Respondents devote pages to a disability claim they never filed. EEOC 5-7; Perich 7-11. They never filed it because the Church far exceeded the re-

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[9] LCMS Bylaws §2.11.2.2, www.lcms.org/Document.fdoc?src=lcm&id=928.

quirements of law in its effort to accommodate Perich's disability. Pet. Br. 8-9. It held her job open from June to January. It was not required to suffer "undue hardship," 42 U.S.C. §12112(b)(5)(A) (2006), but it did, combining three grades into one classroom and enduring the inevitable parent complaints and loss of educational quality. Pet. Br. 8. It was not required to keep Perich on full pay through the fall semester, but it did, J.A. 166-68, 200, despite its financial difficulties. Cf. 29 U.S.C. §2612(a)(1)(D), 2612(d) (2006) (requiring only twelve weeks of unpaid leave).

Relations deteriorated as hardship mounted and diagnoses and projected return dates came and went. *E.g.*, J.A. 126-27. On February 13, some members of the school's volunteer Board expressed their medical concerns in ill-advised ways. But they were entitled to require additional medical information and a second medical examination to answer questions about Perich's ability to perform the job.[10] And by then, Perich had already been replaced for that semester. J.A. 158-59. The Board's remarks were not an employment action.

The only cause of action alleged is retaliation in terminating Perich's employment on April 10, J.A. 16, Pet. App. 72a-73a, 71a, which is when the congregation rescinded her call, J.A. 211-12. That action could be taken only by the congregation, not the Board. Pet. Br. 4.

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[10] 29 C.F.R. §1630.14(c) (2010); EEOC Enforcement Guidance, *Disability Related Inquiries* ¶17 (2000), http://www.eeoc.gov/policy/docs/guidance-inquiries.html#8.

CONCLUSION

This Court should confirm the ministerial exception and hold that respondents' claims are barred. It is now undisputed that Perich performed important religious functions and held ecclesiastical office. She was removed for violating Church teaching, and she asks the courts to override the decision of the highest church authority to consider her fitness for ministry. Such a result cannot be squared with the First Amendment.

The judgment of the Sixth Circuit should be reversed, and the judgment of the District Court should be reinstated.

Respectfully submitted.

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AMICUS CURIAE BRIEF

BRIEFS

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In the Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS* IN THIS CASE[1]

The American Association of Christian Schools (AACS) is one of the leading organizations of Christian schools in the United States. Founded in 1972 and now in operation for almost 40 years, the AACS serves over 100,000 students and 10,000 teachers in more than 800 member schools through a network of 36 state affiliate organizations. The general purpose and objectives of AACS are to aid in promoting, establishing, advancing, and developing Christian schools and Christian education in America. The AACS has historically been a voice for Christian education in the federal legislative and judicial arenas. Today that purpose is carried on with even greater vigor. Protecting member schools from government entanglement, as well as promoting religious freedom, Christian education, and family values are the driving principles in directing AACS's federal efforts.

SUMMARY OF ARGUMENT

The Free Exercise and Establishment Clauses of the First Amendment to the United States Constitution[2] significantly limit governmental

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....").

interference into the daily operations of religious organizations. This Court has been particularly careful to ensure that those limits extend to the employer-employee relationship between religious organizations and teachers. Regardless of the specific subjects taught, this Court has acknowledged the critical and unique role that all teachers play in advancing the mission of the religious organization, where those teachers are expected to incorporate the tenets and doctrine of the religious organization into their conduct, both in and out of the classroom, as an example to their students.

This case presents no reason for departure from these principles. Petitioner made its hiring and retention decisions with respect to Respondent Perich wholly upon religious grounds. It communicated its decisions and religious bases therefore clearly to Respondent Perich. Petitioner had earlier always been clear in its communications to Respondent Perich of an expectation that she would incorporate Petitioner's religious tenets and teachings into her classroom teaching and into the way she conducted herself as an example to her students. A review of Petitioner's hiring and retention decisions will unnecessarily and unconstitutionally involve governmental interference into Petitioner's daily operations and should not be permitted, just as it should not be permitted in any instance where a religious school has made hiring and retention decisions based upon religious grounds with respect to a teacher, where the expectation of all interested parties (the school/religious organization, the teacher, the parents) has been that the teacher has a responsibility to adopt the religious organization's tenets and doctrine, and incorporate

those same tenets and doctrine into his or her conduct.

ARGUMENT

I. THE CONSTITUTION LIMITS GOVERNMENT INTRUSION INTO THE DAILY OPERATIONS OF RELIGIOUS ORGANIZATIONS. THIS COURT HAS SPECIFICALLY APPLIED THAT LIMITATION TO RELIGIOUS SCHOOLS AND TEACHERS.

For one hundred and forty years, this Court has recognized the right of religious organizations to control their internal affairs. *See Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727-29 (1878). In its decision, the *Watson* Court took great care to distinguish its conclusions, based on American principles of religious expression, from the contrary holdings that would ensue from the Chancery Courts in England, which took the view that the decisions of religious organizations were all subject to review by the State's Courts. It is important to remember the eloquently stated words of *Watson*:

> In this country, the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property and which does not infringe personal rights is conceded to all . . . . The right to organize voluntary religious organizations to assist in the expression and dissemination of any

> religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. ***All who unite themselves to such a body do so within an implied consent to this government, and are bound to submit to it.*** But it would be a vain consent and would lead to the total subversion of such religious bodies if anyone aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

Id. at 728-29 (emphasis added). The Court wisely and humbly stated that any appeal to the "ordinary judicial tribunals" of a decision made by the religious organization based upon ecclesiastical law and religious faith "would be an appeal from the more learned tribunal in the law which should decide the case to one which is less so." *Id.* at 729. In so ruling, the *Watson* Court relied on the strength of both the Free Exercise Clause and the Establishment Clause of the First Amendment.

In accordance with general principles, this Court has determined that these religious organizations are presumptively exempt from the application of federal statutes. In *National Labor Relations Board v. Catholic Bishop*, 440 U.S. 490 (1979), the Court was asked to determine whether the National Labor Relations Act, 29 U.S.C. § 158, applied to religious schools, in the context of steps taken by lay teachers employed by religious schools to form labor unions pursuant to the Act. The Court concluded that the NLRA did not apply to religious schools, regardless of the specific classroom assignments of the teachers employed by those schools. *Id.* at 506. In reaching its conclusion, the Court formulated and conducted a two-part inquiry: (a) whether the application of the statute in question "present[s] a significant risk that the First Amendment will be infringed; *id.* at 502, and if so, (b) whether there was a "clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the [statute in question]." *Id.* at 504.

In answering the first question affirmatively, the Court looked back to its prior holding relating to whether government aid could constitutionally be provided to parochial schools to subsidize teachers' salaries. The Court stated that it had "recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school" and that what was said of the schools in *Lemon v. Kurtzmen*, 403 U.S. 602, 617 (1971) ("Religious authority necessarily pervades the school systems"), continued to be true of those religious schools over which the NLRB sought to exercise jurisdiction. 440 U.S. at 501. Importantly, the *Catholic Bishop* Court recalled three additional holdings from its *Lemon* opinion:

1. "[P]arochial schools involve substantial religious activity and purpose." 440 U.S. at 503 (quoting *Lemon*, 403 U.S. at 616).

2. "The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid." *Id.*

3. "[T]he admitted and obvious fact [is] that the *raison d'être* of parochial schools is the propagation of a religious faith." 440 U.S. at 503 (quoting *Lemon*, 403 U.S. at 628 (Douglas, J., concurring)).

The Court concluded that: "[t]he church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school. We see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow." 440 U.S. at 504.

What the *Lemon* Court recognized in determining that there are First Amendment issues in the providing of public aid to teachers at a church-operated school and what the *Catholic Bishop* Court recognized in determining that there are First Amendment issues in the government exerting mandatory collective bargaining and an unfair labor practices regime to teachers at a church-operated school applies equally here. Because of the unique role played by a teacher in a religious school (especially where expectations that the teacher will

incorporate the particular tenets and teachings of the faith into his or her teaching are articulated), there can be no escaping the fact that there are First Amendment ramifications of governmental interference into that employment relationship.

The aid program at issue in *Lemon* attempted to avoid those ramifications by excluding religion class teachers from the proposed subsidies – the Court found that it made no difference, as aid to teachers of non-religion classes still raised a First Amendment issue. The NLRB attempted to escape it by limiting their unionization efforts to lay teachers – the *Catholic Bishop* Court found that lay teachers played a "critical and unique role...in fulfilling the mission of a church-operated school," that mission (or *raison d'être*) being "the propagation of a religious faith." It seems illogical to think that there are any lesser First Amendment concerns when it comes to the federal government injecting itself into the hiring and retention decisions exercised by a religious organization as to teachers, lay or otherwise, who are so critical and unique to the fulfillment of this religious mission.

This is exactly the holding in the case of *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991). The *Little* case involved an attempt to have the court review a decision by a religious organization to not rehire an elementary school teacher. The organization chose not to rehire on the basis of the teacher's entering into a canonically invalid marriage. The district court entered summary judgment for the school, and the Third Circuit affirmed.

Noting that "[t]he Supreme Court has stressed that constitutional issues should be avoided whenever possible," *id.* at 946, the court first analyzed whether the application of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, to Little's claim would raise substantial constitutional questions. The Third Circuit held that if it were to review the employer's decision, it would be forced to determine what the official teachings and doctrine of the church were and whether Little had rejected them. *Id.* at 948. The court further held that any judicial analysis of the claim would necessitate the excessive entanglement of the court with the church. Specifically,

> [T]he inquiry into the employer's religious mission is not only likely, but inevitable, because the specific claim is that the employee's beliefs or practices make her unfit to advance that mission. It is difficult to imagine an area of the employment relationship *less* fit for scrutiny by secular courts. Even if the employer ultimately prevails, the process of review itself might be excessive entanglement.
>
> . . .
>
> In short, interpreting Title VII's prohibition of religious discrimination to apply to the Parish's decision would raise serious constitutional questions under both the free exercise and the establishment clauses. Accordingly, we

> will only do so if Congress clearly intended that result.

Id. at 949.

The same principles are applicable here. In this case, even taking Respondent's assertion as true that she was terminated because of her threat to initiate litigation against her employer (the Church), adjudication of her retaliation claim would require an analysis of the Church's beliefs and practices regarding conflict resolution, and then determining whether Respondent violated those beliefs and practices. As stated by the *Little* court, "the process of review itself might be excessive entanglement," *id.*, regardless of the outcome of the review. *See also Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (holding the Establishment Clause bars "trolling through . . . an institution's religious beliefs"); *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1261-66 (10th Cir. 2008) (requiring government to make a searching inquiry into the religious doctrine of a Christian university to determine whether it should be excluded from a scholarship program is unconstitutional). The same constitutional concerns would exist in any instance involving the hiring and retention practices of a religious school, with respect to teachers who were expected to incorporate the tenets and teachings of the religious organization into the way they conducted themselves in the classroom, who were expected to adhere to the tenets and teachings of the religious organization in the way they conducted themselves in and out of the classroom, and who were informed of these expectations at the outset of each school year.

Accordingly, the second prong of the *Catholic Bishop* analysis must be addressed – is there a clear expression of Congress that teachers in religious schools should be covered by the statute in question? In this regard, Title VII (the statute reviewed by the *Little* court) and the Americans with Disabilities Act (ADA) (the statute at issue in the instant case) contain virtually identical religious exemptions. *See* 42 U.S.C. § 2000e-1(a); 42 U.S.C. § 12113(d)(1). As noted by the *Little* court, these "exemptions reflect a decision by Congress that the government interest in eliminating religious discrimination by religious organizations is outweighed by the rights of these organizations to be free from government intervention." 929 F.2d at 951. The same exemption exists within the ADA, and the same outcome should follow.

The *Catholic Bishop* analysis clearly results in a finding that asking the secular courts to apply the cited provisions of the ADA to this situation presents a significant risk that the First Amendment will be infringed, and that significant risk exists regardless of whether Respondent is classified as a lay teacher, a called teacher, or a commissioned teacher, given this Court's prior holdings as to the unique and significant role played by all teachers in fulfilling the mission of the religious organization.

II. COURTS MUST GIVE SUBSTANTIAL DEFERENCE TO RELIGIOUS ORGANIZATIONS' UNDERSTANDING OF THEIR EMPLOYEES' FUNCTION

In the employment context, lower courts have uniformly applied a "ministerial exception" to further

address the constitutional concerns identified by this Court, namely the evidence of excessive entanglement and the promotion of the free exercise of religion. This "ministerial exception" is known by other names. *See, e.g., Klouda v. Southwestern Baptist Theological Seminary*, 543 F. Supp. 2d 594, 611 (N.D. Tex. 2008) ("ecclesiastical abstention doctrine"). Regardless of what the test is called, its protections are not, and should not be, restricted to ordained ministers. *See, e.g., Catholic Diocese of Peoria*, 442 F.3d 1036, 1040-41 (7th Cir. 2006) (applying exception to organist/music director); *Alicea-Hernandez v. Catholic Bishop*, 320 F.3d 698, 704 (7th Cir. 2003) (press secretary); *EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 803-04 (4th Cir. 2000) (director of music ministries).

In *Lemon* and *Catholic Bishop*, this Court expressly found that that all teachers at religious schools play a critical and unique role in the fulfillment of the religious organization's mission. Accordingly, regardless of the name given to the test used, it is absolutely necessary that any application of the test accord significant deference to this fact and begin from a presumption that the teacher's role qualifies for the exception, precluding governmental interference into the employment relationship.

What is especially obvious is that the "primary duties" test as adopted and applied by the Sixth Circuit in this case cannot be the proper test for application of the "ministerial exception" if this Court's positions regarding Free Exercise and Establishment Clause issues are as they were when deciding *Lemon* and *Catholic Bishop*. The Sixth Circuit stated that "[a]s a general rule, an employee

is considered a minister if 'the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship.'" *EEOC v. Hosanna-Tabor Evangelical Lutheran Church*, 597 F.3d 769, 778 (6th Cir. 2010) (quoting *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007)). The court further stated the importance of looking at the function of the plaintiff's employment position, 597 F.3d at 778, as well as whether a position is important to the spiritual and pastoral mission of the church. *Id.*

Having said all the right words, the Sixth Circuit then seemed to ignore their own instructions, instead adopting an analysis that performed only a superficial examination of the job functions, showed a complete misperception of the role that religious schools generally ask their teachers to perform, and ultimately deferred to a method no more sophisticated than a stopwatch to determine the outcome of this extremely important constitutional issue. In the process, the Sixth Circuit (a) relegated religious school teachers to a far less important role than that recognized by this Court in *Lemon* and *Catholic Bishop*, (b) managed to separate and parse out the duties of a teacher in a way that this Court in *Lemon* and *Catholic Bishop* suggested could not be done with respect to teachers given their unique and critical role, (c) embarked upon a process of review rightly recognized by the *Little* Court as excessive entanglement, and (d) attempted to do what the *Watson* Court said 140 years ago should not be done, namely letting a less able tribunal determine matters of ecclesiastical significance.

Respondent Perich was expected to integrate her faith into every aspect of her teaching. The trial court found that "Hosanna-Tabor's website indicates that it provides a 'Christ-centered education' that helps parents by 'reinforcing biblical principals [sic] and standards.' Hosanna-Tabor also characterizes its staff members as 'fine Christian role models who integrate their faith into all subjects.'" 582 F. Supp. 2d 881, 884 (E.D. Mich. 2008). The Hosanna-Tabor Lutheran Church Employee Handbook in effect during the 2004-05 school year states:

> We consider you [the teacher] to be a gift from God and look forward to working with you as a member of our ministry team. . . . As an employee of Hosanna-Tabor Lutheran Church, you represent this ministry in both your work and private life. Our hope is that you would always be sensitive to how others may see you as you live out your daily life. We encourage you to strive toward living a life that is an example to others of your relationship with God and your belief in the Church's Mission Statement.

Hosanna-Tabor Lutheran Church Employee Handbook, ¶ 1.100.

The Hosanna-Tabor Lutheran School Policy Manual for the same year states:

CURRICULUM

> In keeping with the purpose and aims of Hosanna-Tabor Lutheran School, the curriculum is centered on the Word of God and Christian living. The child has the benefit of hearing God's Word taught daily. We teach the Word of God and Christian living, not as a separate subject only, but rather let it permeate all teaching so that the student may develop a truly complete Christian philosophy of life.

Policy Manual, p. 11. While the Church did not require all teachers to be called or Lutheran, it did require all teachers to have a "relationship with God" and to believe "in the Church's Mission Statement." Moreover, regardless of denominational affiliation, the Church required all teachers to "permeate all teaching" with "the Word of God and Christian living." The concurring opinion in the decision below stated that the Church "did not envision its teachers as religious leaders." 597 F.3d at 784. The Church, however, unambiguously required all of its teachers to be religious leaders, or to occupy "ministerial" roles, and any contrary conclusion again confirms why it is that secular courts are singularly not qualified to determine what comprises "ministerial" roles when attempting to do so from a sectarian perspective.

The Hosanna-Tabor School, like so many religious schools, sought to distinguish itself from secular schools. It existed as a place where God's Word could be taught, and where the tenets of Christianity and

the Lutheran Church could be reinforced and incorporated into the instruction being given to those children whose parents chose to make the financial sacrifice to enroll them at Hosanna-Tabor. Hosanna-Tabor, like all AACS schools, incorporated Christian beliefs into every subject taught. The Bible is incorporated into science, social studies, English Composition, and even math classes. And, at the very heart of this instruction are the teachers. It is the teachers who have the primary contact with the students; it is the teachers who interact with the students every minute of the school day; it is the religious school teacher who, more than any person other than the parents, can serve as a primary conduit for imparting Christian theology into the hearts and minds of the students.

This is the analysis of function performed by this Court in reaching the conclusions it did in *Lemon* and *Catholic Bishop* regarding the sacrosanct role of religious school teachers. Instead of following an individual teacher around with a stopwatch and counting the number of times a word of Scripture was spoken, the proper analysis focuses on the overall function of the position, as measured by the expectations of all interested persons (including the employer, the teacher, and the parents/students).

The unifying element for AACS schools is that all schools operate according to guidelines based on Scriptural principles. As faith-based schools, these principles guide their decisions regarding policies, curriculum, and management structure. These principles also provide the basis for the requirements for the Christian school employees. Naturally, it is important that employees of Christian schools share

the same faith, passion, and commitment to the guiding Scriptural principles which the school is founded upon in order for the school to function well and provide the best, seamless education for the students. This commitment to Biblical principles permits AACS schools to establish a safe and positive environment, and also allows parents the opportunity to ensure their children are given an excellent academic education according to their faith and in advancement of that faith. Indeed, the religious freedom that allows faith-based schools to operate and make management decisions according to their religious conviction and mission is vital to the success of these schools.

This perspective was totally absent from the Sixth Circuit's analysis of Respondent Perich's role as a teacher at Hosanna-Tabor, notwithstanding the fact that this perspective was communicated clearly to Respondent Perich at the time of her hiring, throughout her tenure at the school, and as a basis for the school's decision regarding her non-retention. It also was the perspective under which the employer Church was operating, under which parents making financial sacrifices to ensure that their children were able to attend Hosanna-Tabor were operating, and even under which Respondent Perich and most likely all other teachers at Hosanna-Tabor who also made financial sacrifices in deciding to be a part of a religious school faculty were also operating. Its absence from the analysis renders faulty the Sixth Circuit's holding, and it should be reversed.

When that perspective is properly included and considered, the "ministerial exception" will apply to all teachers employed by an entity recognized as a

religious organization, where there is evidence in hiring documents (*e.g.*, hiring letter, Teacher Handbook, employment contract, or other writing) that the teachers are expected to incorporate tenets and teaching of the religious organization into their assigned classroom subjects, and expected to otherwise conduct themselves in accordance with those tenets and teaching. It most definitely includes Respondent Perich.

CONCLUSION

Amicus American Association of Christian Schools respectfully requests that this Court reverse the judgment of the Sixth Circuit, and reinstate the judgment of the District Court.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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BRIEF OF *AMICI CURIAE* AMERICAN BIBLE SOCIETY, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, ASSOCIATION OF GOSPEL RESCUE MISSIONS, AWANA CLUBS INTERNATIONAL, AZUSA PACIFIC UNIVERSITY, BETHESDA MINISTRIES, THE CHRISTIAN AND MISSIONARY ALLIANCE, CHRISTIAN CAMP & CONFERENCE ASSOCIATION, COMPASSION INTERNATIONAL, CRISTA MINISTRIES, EVANGELICAL COUNCIL FOR FINANCIAL ACCOUNTABILITY, MOODY BIBLE INSTITUTE OF CHICAGO, THE NAVIGATORS, NEW TRIBES MISSION, TRANS WORLD RADIO, AND UPWARD SPORTS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici constitute a diverse group of religious ministry organizations and collectively they conduct many different types of activities including humanitarian relief, community development, care for seniors, education in "arts and sciences" at all levels and training in religious texts and religious living. *Amici* conduct all of their activities out of a Christian motivation and in furtherance of their respective Christian missions.

Like many other religious organizations, *amici* are guided by their beliefs to carry out their activities as associations of like-minded believers, and their doing so is an expression of those beliefs. Further, the experience of community within such religious associations often inspires and energizes their service to others. Shared religious belief among those carrying out *amici*'s activities also ensures that these activities are conducted in a manner that distinctly expresses and exercises their religious convictions.

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Just as *amici* hold a variety of distinct beliefs within the broader framework of Christianity, they also take different approaches to leadership. *Amici* apply different labels to their leadership positions, require different qualifications and assign different duties. But notwithstanding these differences, *amici* all require their leaders to define or transmit to others the distinct religious convictions of their respective organizations. These leaders bear the responsibility to determine the activities and policies that will best exercise and express their respective organization's beliefs. Therefore, the selection by *amici* of their ministry leaders lies at the heart of their religious exercise and expression.

The decision in this case could have significant implications for the foundational religious liberty interests *amici* share in selecting their ministry leaders without governmental interference. Further, how this Court characterizes the religious exercise and expression in this case, and the applicable religious liberty interests, will likely establish a framework for future deliberations within all branches of government on questions of religious hiring. In this regard, *amici* believe that the Sixth Circuit's "primary duties" test fails to comprehend *amici*'s religious calling to perform many seemingly secular functions. Therefore, *amici* are respectfully submitting this brief to describe the distinct religious significance of ministry leadership positions and the legal principles that prohibit courts from applying the "ministerial exception" in a manner that defines

ministry leadership positions by independently distinguishing between religious and secular duties.

The religious character and mission of the *amici* are as follows.

American Bible Society ("ABS") works to make the Bible available to every person in a language and format each can understand and afford, so all people may experience its life-changing message. Established in 1816 and based in New York City, the ministries of ABS include publishing the Good News Translation (1976) and the Contemporary English Version (1991) of the Bible, and creating a variety of Scripture-based materials to help people engage with the message of the Bible.

Association of Christian Schools International ("ACSI") is the largest association of Protestant schools in the world, having more than 5,000 member Christian schools in more than 100 nations. ACSI is based in Colorado Springs. Its mission is to enable Christian educators and schools worldwide to effectively prepare students for life.

Association of Gospel Rescue Missions ("AGRM") exists to proclaim the passion of Jesus toward the hungry, homeless, abused, and addicted; and to accelerate quality and effectiveness in member missions. Every year, AGRM member missions located throughout the country serve nearly 42 million meals, provide more than 15 million nights of lodging, bandage the emotional wounds of thousands of abuse

victims, and graduate 18,000-plus individuals from addiction-recovery programs.

AWANA Clubs International provides fully-integrated evangelistic and discipleship programs for ages 2 to 18 that actively involve parents, church leaders and mentors. Each week, more than 1.5 million children and youth, 250,000 volunteers and 170-plus field staff take part in Awana in over 22,000 churches in the U.S. and internationally. Awana is based in the Chicago area.

Azusa Pacific University ("APU") is a comprehensive, evangelical, Christian university located near Los Angeles. A leader in the Council for Christian Colleges & Universities, APU is committed to God First and excellence in higher education. APU serves more than 8,500 students on campus, online and at 7 regional centers, offering more than 60 areas of undergraduate study, 26 master's degree programs, and 7 doctorates.

Bethesda Ministries is a nonprofit Christian ministry organization headquartered in Colorado Springs whose mission is to provide child care, education and health care to over 40,000 impoverished children in 19 countries through *Mission of Mercy*. Bethesda Ministries also has a nonprofit subsidiary, whose mission is to care for seniors with dignity, including those whose financial status qualifies them for Medicaid. The subsidiary operates 15 residential senior living communities in 6 states with over 600 employees.

The Christian and Missionary Alliance is a church denomination and missionary organization with about 429,000 members in over 2,000 churches in all 50 states. In addition, there are over 800 missionaries in 58 nations supported by the organization. Based in Colorado Springs, the organization also sponsors a number of educational institutions and retirement centers around the country.

Christian Camp and Conference Association ("CCCA") provides resources for leaders and participants in camping and conference organizations. There are more than 900 Christian camps and conference centers who are CCCA members and every year nearly eight million people participate in their programs.

Compassion International ("Compassion") is a Christian child advocacy ministry that, in response to Christ's instructions to his followers (the "Great Commission"), releases children from their spiritual, economic, social and physical poverty and enables them to become responsible and fulfilled Christian adults. Based in Colorado Springs, Compassion provides regular support to more than one million children in 24 countries.

CRISTA Ministries ("CRISTA") was founded in 1948 and its corporate offices are in Seattle. CRISTA's mission is to love God by serving people – meeting practical and spiritual needs – so that those it serves will be built up in love, united in faith and maturing in Christ. CRISTA has 2 senior living facilities (over

600 residents), 3 broadcasting stations, 2 K-12 Christian schools, a school for at-risk-teens, 2 camps, a veterinary mission and an international relief organization operating as World Concern. World Concern works with communities in some of the most neglected areas of the world, including Myanmar and Chad.

Evangelical Council for Financial Accountability ("ECFA"), based in Virginia, provides accreditation to leading Christian nonprofit organizations that faithfully demonstrate compliance with established standards for financial accountability, fundraising and board governance. ECFA members include Christian ministries, denominations, churches, educational institutions and other tax-exempt 501(c)(3) organizations. Collectively, ECFA member organizations represent more than $18 billion in annual revenue.

Moody Bible Institute of Chicago ("Institute") was established in 1886 by D.L. Moody. The Institute is a nonprofit organization with broadcasting, publishing, and education branches. Approximately 4,000 students representing over 38 countries study each year in the undergraduate and graduate programs. The Institute has 83 full-time faculty members and approximately 600 employees.

The Navigators is an international, interdenominational Christian ministry established in 1933. Navigators are characterized by an eagerness to introduce Jesus to those who don't know Him, a

passion to see those who do know Jesus deepen their relationship with Him, and a commitment to training Jesus' followers to continue this nurturing process among the people they know. Based in Colorado Springs, the Navigator staff family – 4,600 strong – includes 70 nationalities.

New Tribes Mission ("NTM") and its more than 3,000 missionaries start tribal churches among people who have no concept of the God of the Bible. Based in Sanford, Florida, NTM missionaries in over 20 countries seek to establish mature churches that can take their rightful place as agents of change in their own communities and partners in the Great Commission of Jesus Christ.

Trans World Radio ("TWR") is a global media outreach that engages millions in 160 countries with biblical truth. Based in Cary, North Carolina, TWR ministries speak fluently in more than 200 languages and dialects. Together with international partners, local churches and other ministries, TWR provides relevant programming, discipleship resources and dedicated workers to spread hope to individuals and communities around the globe.

Upward Sports provides the world's largest Christian sports program for children. Each year some one million people around the world play, coach, referee or volunteer in Upward Sports Leagues and camps hosted by more than 2,400 churches. These churches have taken Upward Sports Programs to 67

countries. Upward Sports has its headquarters in Spartanburg, South Carolina.

SUMMARY OF ARGUMENT

This case asks whether the "ministerial exception" bars a former teacher from bringing a claim under the Americans with Disabilities Act against Hosanna-Tabor Evangelical Lutheran Church and School (the "School"). The School claims the teacher is subject to the exception because as a teacher she played an important role in the religious mission of the school. She was also recognized as a "commissioned" minister by the Lutheran Church Missouri Synod. The Sixth Circuit, however, determined that her position was not subject to the "ministerial exception" because her "primary duties" were not sufficiently religious. *Equal Employment Opportunity Commission v. Hosanna-Tabor Evangelical Lutheran Church and School,* 597 F.3d 769, 779-81 (6th Cir. 2010).

The question in this case consists of two parts: (1) does the constitution preclude courts from enforcing statutory limitations on the criteria by which churches and other religious organizations select their ministry leaders, and (2) how can courts distinguish between ministry leadership and other positions? With respect to the first part, this brief discusses the diverse types of activities in which religious organizations engage and the foundational role leadership positions play in the religious exercise

and expression of all types of religious organizations. The brief then summarizes how the "ministerial exception" results from applying these factors to principles of religious deference and neutrality.

With respect to the second part, this brief argues that a court cannot parse the duties of various positions to determine independently (without deference to religious organizations) whether they are sufficiently religious or whether they align with the court's notion of what religious leaders do. Instead, courts must defer to the *bona fide* representations of religious organizations regarding their leadership positions. The brief concludes by explaining how the Sixth Circuit's "primary duties" test violates these core religious liberty principles.

1. The "ministerial exception" properly defers to the selection by churches and other religious organizations of their ministry leaders.

Many churches and other religious organizations are defined by the common religious commitment of their members and employees. As Justice Brennan wrote in this Court's leading case upholding religious hiring rights: "determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is ... a means by which a religious community defines itself." *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring). By associating with fellow believers in

carrying out their activities, religious organizations not only *express* religious beliefs to others, but they also separately and independently *exercise* those beliefs.

These principles apply with additional force to the selection by religious organizations of their ministry leaders. It is these leaders who make the critical determinations referred to above by Justice Brennan; they ensure that each organization's activities and personnel reflect and express its distinctive religious beliefs. Therefore, the selection of these leaders is central to each organization's religious exercise and expression.

This Court's cases, as well as those of lower courts, have consistently deferred to the determination by religious organizations of certain core institutional issues. These determinations include both the interpretation of religious doctrine and, as applied to the "ministerial exception," the selection of ministry leaders. This deference facilitates the flourishing of the diverse religious life that characterizes and energizes this country. And it gives substance to the sentiment that civil government is not the highest authority in human affairs. Separation of church and state would have little practical force if courts or other government officials could dictate the terms by which religious organizations select their leaders.

2. Religious liberty principles of deference and neutrality dictate a "ministerial exception" that applies to all *bona fide* ministry leadership positions.

The contentious issue with respect to the "ministerial exception," and the immediate question in this case, is how to identify those positions within a religious organization to which the exception applies. The line between minister and non-minister employees, like the line between religious and secular duties, is a difficult line to draw in a way that can be administered by courts. As an initial matter, notwithstanding the "ministerial exception" label, the exception cannot be limited to religious or ministry leaders who happen to be traditional Christian church ministers. The Constitution's fundamental commitment to neutrality among different forms of religious expression dictates that the exception must encompass both traditional and nontraditional ministry leadership positions within the diverse forms of religious communities in this country. For this reason, courts cannot measure the extent to which a position's duties align with a particular model of religious activity or ministry leadership. Further, constitutional deference prohibits courts from independently determining whether an employee qualifies as a "minister" pursuant to the tenets of a religious employer.

These same principles of deference and neutrality also prohibit courts from applying the exception only to those positions determined based on the court's own standards to be sufficiently religious.

Government officials and courts have neither the competence nor the authority to distinguish between "ministerial" and other positions based on their own views of the religious character of the duties, and doing so results in religious entanglement and favoritism.

In applying the "ministerial exception," then, courts must defer to *bona fide* representations of religious organizations regarding who is a minister or who exercises important religious leadership in an organization. As part of this assessment, the fact that the organization has conferred a ministry leadership title on the position (or the individual holding the position) may create a presumption that the position is a *bona fide* leadership position. But no particular title can be required: the exception applies as much to rabbis, gurus, imams, vicars, campus directors, presidents, executive directors, priests, chaplains and elders as it does to ministers, provided that in each case the title represents a *bona fide* ministry leadership position.

Similarly, a court may consider the duties of the position to determine whether the organization has made false or materially inconsistent representations regarding the religious leadership nature of the position. But to the extent the religious character of duties are relevant, such character must be based on the organization's purpose for the duties and not on the court's subjective measure of their apparent religious qualities.

3. By excluding positions in which the "primary duties" are not sufficiently religious, the Sixth Circuit's test denigrates religious exercise and disregards constitutional limits.

The Sixth Circuit's "primary duties" test fails on all these points. The test entirely ignores the *bona fide* limitation, and it violates the neutrality requirement by imposing a ministry leader standard based on the Sixth Circuit's perception of the types of activities in which ministers primarily engage (e.g., "teaching, spreading the faith ... participation in religious worship"). *Hosanna-Tabor*, 597 F.3d at 778. As applied, the court abandons all deference by requiring courts to determine independently whether a position's duties are sufficiently religious to align with one or more of the activities in this standard. In this case, the court summarily concluded that a position which each day involves teaching "secular" subjects ("without incorporating religion") for six hours and fifteen minutes and conducting "religious" activities for forty-five minutes is not a ministry leadership position. *Id.* at 780.

Predictably, the Sixth Circuit's analysis is incoherent. As an initial matter, this analysis rests on the flawed premise that teaching "secular" subjects is only a religious activity if religion is incorporated in some unspecified manner. This premise trivializes the religious convictions which underlie the commitment of many religious organizations to provide educational and/or social services. For instance, the Bible teaches that true religion consists of taking care of

widows and orphans (it does not mandate "incorporating religion" into such care). That a secular organization might embrace a similar mission for nonreligious reasons does not diminish the religious significance of this Biblical mandate to a religious organization. A "ministerial exception" that excludes leadership positions engaged in, for instance, educational or social service activities would require religious organizations which believe they are called to provide such services to sacrifice their religious liberty in order to fulfill their religious duties.

In addition to imposing a false distinction between secular and religious activities, the Sixth Circuit's test improperly requires courts to determine independently the religious meaning or significance of the various duties of a position. The test provides no criteria for how (or how much) "religion" must be incorporated into "secular" classes, or for how much more time each day must be spent on "religious" activities, in order to satisfy the ministry leadership standard. So, for instance, there is no guidance to compare the position of director of a rescue mission run by a Baptist church that includes a specific denominational prayer and an evangelistic message in each of its activities with the director position of a rescue mission run by a Methodist church that requires no prayers but offers optional Bible studies and worship services. In short, the test sets courts adrift in a sea of subjective religious determinations which they have no competence or authority to

navigate; it will inevitably produce arbitrary and discriminatory results.

Amici respectfully request this Court to affirm that the "ministerial exception" applies to all *bona fide* ministry leadership positions, and that the determination of such positions turns not on the court's view of whether the "primary duties" are sufficiently religious, but rather on whether the *bona fide* "primary purpose" of the position is religious leadership.

ARGUMENT

I. The "ministerial exception" properly defers to the selection by churches and other religious organizations of their ministry leaders.

A. Ministry leaders determine the religious expression and exercise of their organizations.

The short descriptions of *amici* in the Statement of Interests section of this brief reveal that *amici*, like many other religious organizations, engage in a wide variety of activities serving the physical, emotional and spiritual needs of people. A number of organizations, such as Compassion International, CRISTA and Bethesda Ministries focus on delivering humanitarian relief and basic life sustenance resources and services to the desperately needy. These organizations and others have been on the front lines responding to

catastrophic events such as the earthquake in Haiti and the tsunami in Japan.[2]

Other organizations, such as members of the Association of Gospel Rescue Missions reach out to the homeless and others on the margins of society, providing shelters, meals, and job and life skills training to help these persons work back into society. While some organizations serve a range of human needs, others focus on the specific needs of certain social segments. For instance, Upward Sports and Awana Clubs International each operate youth programs providing recreational opportunities and biblical instruction, and CCCA members provide camping experiences.

The Association of Christian Schools International has over 5,000 member institutions providing accredited educational programs. Azusa Pacific University provides fully-accredited higher educational programs to over 8,500 full and part-time students, and Moody Bible Institute provides undergraduate and graduate biblical training (in additional to radio broadcasting and publishing). Other *amici* engage in various forms of missionary work, spreading the

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[2] The Evangelical Council for Financial Accountability, an organization which accredits Christian ministries complying with rigorous financial and governance standards, has posted on its website a list of member organizations responding to these disasters. *See* ECFA Servant Match, *available at* www.ecfa.org/ServantMatch.aspx?Type=Haiti; www.ecfa.org/ServantMatch.aspx?Type=Japan+Relief (last visited June 14, 2011).

Christian faith and planting and nurturing local church communities in the U.S. and around the world.

Amici and other religious organizations view their respective activities, whether serving the poor or elderly or marginalized, or providing education, or offering distinctly religious worship or evangelism, both as service to God and as an expression of religious faith. For example, Compassion International performs humanitarian work in response to the "Great Commission" (Jesus' command to his followers to make disciples). Mission Statement, *available at* http://www.compassion.com/mission-statement.htm (last visited June 14, 2011). As explained by Justice Brennan in *Amos*: "Churches often regard the provision of [community] services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster...." 483 U.S. at 344 (Brennan, J., concurring).

In carrying out their activities, religious organizations often adopt religious requirements for some or all of their workers. Such religious associational policies help these organizations ensure that their activities, some of which may be similar to those of secular organizations, maintain their distinctive religious character. The point is not just that services are being provided, but that services are being provided by religious followers as an expression and exercise of their religious beliefs.

Moreover, the full expression and, separately, exercise of religion comes not just from conducting such activities, but from conducting them as an association of like-minded believers. That associations may have an expressive component entitled to protection has long been recognized by this Court. In *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984), this Court held that:

> ... collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. Consequently, ... implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

Through their religious associational policies, religious organizations not only *express* distinctive religious convictions but they also separately *exercise* religion. The carrying out of certain activities in service to society and the associating with fellow believers are intertwined, and often the latter energizes the former. This Court has repeatedly observed that religious activities and association can be a form of religious exercise. In his opinion in *Amos*, Justice Brennan observed that:

> Religion includes important communal elements for most believers. They exercise their religion through religious organizations....

> For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals.

Amos, 483 U.S. at 341-43 (1987) (Brennan, J., concurring) (internal quotation omitted). Similarly, in *Wisconsin v. Yoder*, this Court observed that "Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept of life aloof from the world and its values is central to their faith." 406 U.S. 205, 210 (1972). This Court further noted that the Amish base this concept on "their literal interpretation of the Biblical injunction from the Epistle Of Paul to the Romans, 'be not conformed to this world....'" *Id.* at 216.

Clearly different religious organizations, even those of the same general faith, will reach different conclusions regarding the particular activities and associational requirements that best nurture and carry out the dictates of their faith. Perhaps not many religious organizations believe the associational requirements apply as broadly as do the Amish. But the important point is that in each case this determination is based on religious beliefs as interpreted and applied by the leaders of the religious organization.

Religious or ministry leaders bear the responsibility of determining which activities and associational policies will best accomplish the religious missions of their respective organizations. In addition, they must ensure that the activities and policies are carried out in a manner that reflects each organization's distinctive religious beliefs. For these reasons, a religious organization's selection of its ministry leaders lies at the heart of its religious expression and exercise.

B. Core religious liberty principles prohibit the enforcement of laws that interfere with the selection of ministry leaders.

Religious liberty as conceived by this country's Founders started with the twin propositions that duty to God transcends duty to society and that true religious faith cannot be coerced. James Madison captured these propositions in his *Memorial and Remonstrance Against Religious Assessments:*

> It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe[.]

Id., reprinted in Everson v. Board of Education of Ewing, 330 U.S. 1, 64 (1947) (appendix to dissenting

opinion of Rutledge, J.). Thomas Jefferson incorporated the same propositions into the Virginia Act for Religious Freedom, which in its preamble asserts that any attempt by the government to influence the mind through coercion is "a departure from the plan of the Holy Author of our religion, who, being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do...." Va. Code Ann. § 57-1 (West 2003). Because individuals possess an inalienable right and duty to worship God as they deem best, government can have no authority over religious exercise as such. Put differently, civil government is not the highest authority in human affairs.

Accordingly, religious liberty in our constitutional system protects religious organizations from intrusive or discriminatory governmental action that impairs the religious character of such organizations. Among other things, such protection fosters religious diversity. As this Court observed in *Yoder*, " ... in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles. There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.'" *Yoder*, 406 U.S. at 223-24. This Court further noted that "[e]ven their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage." *Id.* at 226.

Rules of religious deference and neutrality based on these fundamental principles dictate an exemption for religious organizations from laws that impose liability with respect to the selection by such organizations of their ministry leaders. As Justice Brennan stated in *Amos*, " ... religious organizations have an interest in autonomy in ordering their internal affairs so that they may be free to: *select their own leaders*, define their own doctrines, resolve their own disputes, and run their own institutions." *Amos*, 483 U.S. at 341-43 (1987) (Brennan J., concurring) (emphasis added; internal quotation omitted). Such a "ministerial exception" has been widely recognized by federal courts. *See Hosanna-Tabor*, 597 F.3d at 777-78.

II. Religious liberty principles of deference and neutrality dictate a "ministerial exception" that applies to all *bona fide* ministry leadership positions.

The primary issue in this case is how courts can distinguish between minister and non-minister positions. This distinction must be guided by the following rules grounded in religious liberty principles of deference and neutrality.

A. Courts cannot independently search for religious meaning or significance in a position's duties.

This Court has repeatedly held that government officials have no competence or constitutional authority to interpret or apply religious beliefs, or to determine independently the religious significance of various activities. In *New York v. Cathedral Academy*, 434 U.S. 125 (1977), for example, this Court struck down a statute which required government officials to "review in detail all expenditures for which reimbursement is claimed, including all teacher-prepared tests, in order to assure that state funds are not given for sectarian activities." *Id.* at 132. This Court noted that the requirement would place religious schools "in the position of trying to disprove any religious content in various classroom materials" while at the same time requiring the state "to undertake a *search for religious meaning* in every classroom examination offered in support of a claim." *Id.* at 132-33 (emphasis added). This Court concluded that "[t]he prospect of church and state litigating in Court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." *Id.* at 133.[3]

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[3] *See also Hernandez v. Commissioner*, 490 U.S. 680, 694 (1989) (in income tax exemption context, pervasive governmental inquiry into "the subtle or overt presence of religious matter" is proscribed by the First Amendment Establishment Clause).

Ten years later, this Court in *Amos* upheld against an Establishment Clause challenge, a religious exemption that applied to all activities of a religious organization, not just its *religious activities*. This Court observed that "[t]he line [between religious and secular activities] is hardly a bright one and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission." *Amos*, 483 U.S. at 336.

This limitation applies not just to distinctions between religious and secular activities, but also to different types of religious activities. In *Widmar v. Vincent*, the Court rejected a proposal to permit students to use buildings at a public university for all religious expressive activities except those constituting "religious worship." 454 U.S. 263, 269 n.6 (1981). The Court observed that the distinction between "religious worship" and other forms of religious expression "[lacked] intelligible content," and that it was "highly doubtful that [the distinction] would lie within the judicial competence to administer." *Id.* The Court noted that "[m]erely to draw the distinction would require the [State] – and ultimately the Courts – to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases." *Id.*; *see also id. at* 272 n.11 (noting the difficulty of determining which words and activities constitute religious

worship due to the many and various beliefs that constitute religion).

These cases all recognize that in practice discerning the religious significance of an activity or duty (for instance, whether it constitutes religious worship or religious instruction) requires doctrinal interpretation. Government officials making such a determination independently may, on the one hand, analyze the activity by interpreting the organization's religious doctrine, a task which is clearly outside of their competence. Such discernment requires precisely the inquiry into the religious significance of words and practices expressly rejected in *Cathedral Academy* and *Widmar* (among others). *See also, Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976) (holding that courts cannot review whether actions of religious organizations "involving matters of discipline, faith, internal organization, or ecclesiastical rule, custom or law" comply with church laws and regulations). Alternatively, government officials may compare the activity with activity they implicitly perceive to be "religious." But this approach not only fails for the reasons described above, it also creates an implicit state-defined orthodoxy regarding religious activities and interferes with the right of religious institutions to determine and apply their own doctrine.

These same constraints preclude courts from independently determining the religious character of an *organization* (and, by extension, a *position*) based

on its activities and policies. As one example, the Court of Appeals for the D.C. Circuit struck down a *substantial religious character* test used by the National Labor Relations Board to determine whether it could exercise jurisdiction over a religious organization. *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). In evaluating a religious school, for instance, the test required the NLRB to consider "such factors as the involvement of the religious institution in the daily operation of the school, the degree to which the school has a religious mission and curriculum, and whether religious criteria are used for the appointment and evaluation of faculty." *Id.* (quotation omitted).

The court concluded that the test "boils down to 'is [an institution] sufficiently religious?'" *Id.* at 1343. The court further held that "very process of inquiry" into the "'religious mission' of the University," as well as "the Board's conclusions have implicated [] First Amendment concerns...." *Id.* at 1341 (citing *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979)); *see also Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality) ("It is well established, in numerous other contexts, that Courts should refrain from trolling through a person's or institution's religious beliefs.").

B. Courts cannot limit the "ministerial exception" to positions that conform to traditional standards of ministry leadership or are otherwise sufficiently religious.

Distinctions based on a court's view of the relative religious significance of various activities inevitably favor expressly religious or conventional methods of accomplishing a religious mission over other more ecumenical or unorthodox methods. In *Fowler v. Rhode Island*, 345 U.S. 67 (1953), this Court struck down a city ordinance that in critical respects was the opposite of the proposed policy rejected in *Widmar*. Specifically, the ordinance permitted churches and similar religious bodies to conduct *worship services* in its parks, but it prohibited *religious meetings*. The ordinance resulted in the arrest of a Jehovah's Witness as he addressed a peaceful religious meeting. The Court held that the distinction required by the ordinance between *worship* and an *address on religion* was inherently a religious question and invited discrimination:

> Appellant's sect has conventions that are different from the practices of other religious groups. Its religious service is less ritualistic, more unorthodox, less formal than some.... [It is not] in the competence of Courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings.... To call the words which

> one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another.

Id. at 69-70.

More recently, this Court struck down state law that contained an exemption for religious organizations, but only if they received more than half of their total contributions from members or affiliated organizations. *Larson v. Valente*, 456 U.S. 228, 231-32 (1982). Although the law nominally applied secular criteria, this Court held that the criteria created an unconstitutional religious preference because it "effectively distinguishe[d] between well-established churches that have achieved strong but not total financial support from their members ... and churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members...." *Id.* at 245 n.23 (internal citation and quotation omitted).

Religious favoritism also results from measuring religiosity. The Tenth Circuit Court of Appeals recently struck down a multi-factor test intended to separate *pervasively sectarian* educational institutions from other religious educational institutions, allowing the latter but not the former to participate in a state student aid program. *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008). The court concluded that the pervasively sectarian

test violated the First Amendment because it "necessarily and explicitly discriminate[d] among religious institutions ... ," *id.* at 1258, and "the discrimination is expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations, as defined by such things as the content of its curriculum and the religious composition of its governing board." *Id.* at 1259.

Because of the many different types of ministry leadership positions, it is not difficult to see how classifying such positions based on a court's view of religious characteristics leads to favoritism. For instance, suppose a religious institution expresses its religious value of caring for the needy by providing meals and shelter, and that the theological tradition of this institution emphasizes "teaching by example" over preaching. For such an organization, leadership may consist primarily of providing meals and shelter. However, because courts are not competent to interpret the institution's doctrine, they cannot conclude based on this doctrine that the activities reflect religious values. So instead, they may conclude based on their own conceptions of orthodoxy that the activities are not religious. But this conclusion favors one religious tradition regarding how to serve and teach over another.

A "ministerial exception" limited to sufficiently religious activities as perceived by a court also creates incentives for organizations to include more distinctly religious content in the duties of their leaders. In the preceding example, the organization

would be well advised to add distinctly religious duties such as prayer and Bible teaching to the leader's position. Doing so would strengthen the argument that the position qualifies for the "ministerial exception" under the Sixth Circuit's test, even though the position would, ironically, be less faithful to the organization's religious tradition.

C. The distinction between ministerial and other positions turns on whether the organization's representations regarding a position's religious leadership purposes are *bona fide*.

The question for "ministerial exception" purposes should not be whether a position is "sufficiently religious" as measured by a court's assessment of the religious significance of the position's duties, or whether it aligns with a particular model of ministry leadership. The question instead should be whether the organization's representations regarding the religious leadership purposes of the position are *bona fide*.

In this regard, the Third Circuit Court of Appeals recently determined that an organization qualified for a religious exemption because its "primary purpose was religious." *Leboon v. Lancaster Jewish Community Center Ass'n*, 503 F.3d 217, 231 (3rd Cir. 2007). This definition of a religious organization, based on the religious character of its primary purpose(s), is consistent with other statutory definitions.

For instance, federal law provides an exemption from unemployment insurance obligations for employers which are "operated primarily for religious purposes." 26 U.S.C. § 3309(b). Similarly, the Internal Revenue Code exempts from income tax organizations which are organized and operated exclusively for religious purposes. 26 U.S.C. § 501(c)(3).

To determine whether the primary purpose for a position is religious leadership, government officials cannot (and need not) independently weigh the religious significance of various duties of the position. But they can independently determine whether an organization's asserted religious purposes for the position are merely a sham, or whether there is at least a plausible connection between the position's duties and its stated primary purposes. In *U.S. v. Ballard*, 322 U.S. 78 (1944), this Court held that although courts cannot inquire into whether an individual's asserted religious beliefs are true, they can inquire into whether the individual honestly and in good faith actually holds such beliefs. *See also Unification Church v. Immigration and Naturalization Service*, 547 F.Supp. 623, 628 (D.D.C. 1982), ("when Congress permitted an alien's status to turn upon religious considerations[,] it intended that the Immigration and Naturalization Service does no more than to determine if the religion in question is *bona fide*"). As this case suggests, although the First Amendment limits governmental inquiry regarding religious matters, it does not preclude government

officials from determining whether an organization is making false statements regarding its religious beliefs. Accordingly, governmental officials can examine an organization's activities, but only for the limited purpose of verifying that its representations are *bona fide* and sincerely held.[4]

As one example, the court in *University of Great Falls* held that the religious character of an organization may be determined by confirming that the organization holds itself out to the public as a religious organization. 278 F.3d at 1344. Similarly, government officials could inquire into whether an organization has consistently asserted a *bona fide* religious leadership purpose for the position or whether it is opportunistically asserting such a purpose merely to claim the "ministerial exception." Finally, the title given to an individual or position, and the associated qualifications, may also provide some indication of the *bona fide* nature of the religious representations. Indeed, they may even create a presumption of *bona fide* ministry leadership. But no particular title or set of qualifications can be required; different religious

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[4] To the extent specific duties or activities are relevant to a *bona fide* inquiry, it should be clear that the religious character of a duty turns on the purpose for which the duty is performed. *See e.g.*, *Widmar v. Vincent*, 454 U.S. at 271 n.9 (explaining that the distinction between religious and nonreligious speech is based on the purpose of such speech).

traditions use different titles, or the same title for different purposes, or no titles at all.[5]

III. By excluding positions in which the "primary duties" are not sufficiently religious, the Sixth Circuit's test denigrates religious exercise and disregards constitutional limits.

The Sixth Circuit's primary duties test examines the duties of a position not to determine whether the organization's representations are *bona fide* but rather to determine whether the duties are sufficiently religious to fit a particular model of ministry leadership. Under this model, a ministry leader is one "whose primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." *Hosanna-Tabor*, 597 F.3d at 778.

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[5] In *Jin Soo Lee v. Immigration and Naturalization Service*, 541 F.2d 1383 (9th Cir. 1976), the court reversed a decision of the INS that a beneficiary was not a *bona fide* "religious worker" under the applicable regulations. The court concluded that a religious worker provision which included a requirement that the alien possess "special skills" did not mean that the alien "must meet some specific standards of training set by the Attorney General or by the Service." 541 F.2d at 1386. Instead, the regulation "leaves to the particular religious order for whom the alien works the establishment of the kind of skills, training and experience that specially qualify the alien for the religious duties that he performs." *Id.*

In applying this test, the Sixth Circuit determined that the teaching position did not fit this model because "the primary function was teaching secular subjects." *Id.* at 780. The court based this conclusion on the findings that the position involved "six hours and fifteen minutes ... teaching secular subjects, using secular text books, without incorporating religion into the secular material," and that "activities devoted to religion consumed approximately forty-five minutes of the seven hour school day." *Id.* at 779-80.

A. The premise of the test denigrates religious exercise.

The premise of the Sixth Circuit's analysis – that certain activities are secular and not religious if they are conducted by others for nonreligious reasons – is not only inconsistent with the case law described above, but it also effectively secularizes a vast array of religious activity. It would essentially mean, for instance, that six of the Ten Commandments (honor your parents and do not murder, steal, lie, covet or commit adultery – Exodus 20: 2-17) are no longer religious because they have been widely embraced by society. Religious organizations formed to fulfill these particular Commandments would not be religious, nor would religious humanitarian organizations, soup kitchens, hospitals, and educational institutions. Indeed, applying this position, Mother Theresa's activities to serve the poor out of obedience to God would not qualify as serving a religious purpose.

The Third Circuit in *Leboon* rejected an argument that a Jewish Community Center was not a religious organization because it promoted principles, such as tolerance and healing the world, which are shared by nonreligious persons. The court held that "[a]lthough the [community center] itself acknowledges that some of these principles exist outside Judaism, to the extent that [the community center] followed them as Jewish principles this does not make them any less significant." *Leboon*, 503 F.3d at 230.

The court in *University of Great Falls* also rejected this premise, affirming that a litany of "secular" characteristics of the University:

> ... says nothing about the religious nature of the University. Neither does the University's employment of non-Catholic faculty and admission of non-Catholic students disqualify it from its claimed religious character. *Religion may have as much to do with why one takes an action as it does with what action one takes*. That a secular university might share some goals and practices with a Catholic or other religious institution cannot render the actions of the latter any less religious.... If the University is ecumenical and open-minded, that does not make it any less religious, nor NLRB interference any less a potential infringement of religious liberty.

278 F.3d at 1346 (emphasis added).

These cases affirm that the purposes and activities of a religious organization are no less religious merely because others may embrace similar purposes or conduct similar activities for nonreligious reasons. The same applies for the duties of employees of such organizations. To hold otherwise would mean that those religious organizations which are called to serve tangible human needs would be required to sacrifice their religious character in order to fulfill their calling. Such a result trivializes religious liberty.

B. The test's independent search for religious meaning disregards religious deference and neutrality.

The Sixth Circuit's test not only rests on a false premise, but it also improperly requires courts to search for religious meaning in the duties of a position. The Tenth Circuit in *Colorado Christian* provided several examples of how measuring religious content in various activities results in unconstitutional religious determinations. One of the factors in the *pervasively sectarian* test at issue in that case was whether an institution's curriculum required religion courses that tended to indoctrinate or proselytize. *Colorado Christian University*, 534 F.3d at 1262. The court noted that the line "between 'indoctrination' and mere education is highly subjective and susceptible to abuse." *Id.* Accordingly, the court concluded that "[t]he First Amendment does not permit government officials to sit as judges of the

'indoctrination' quotient of theology classes." *Id.* at 1263 (emphasis added).

Another factor considered by the Tenth Circuit in the *pervasively sectarian* test was whether the students, faculty, trustees or funding sources of an institution are "primarily" of a "particular religion." *Id.* at 1264. The court noted that identifying a "particular religion" required a definition of ecclesiology and that "the government is not permitted to have an ecclesiology, or to second-guess the ecclesiology espoused by our citizens." *Id.* at 1265.

The primary duties test as applied by the Sixth Circuit raises similar analytical issues to those in the pervasively sectarian test (and in the substantial religious character test in *University of Great Falls*). For example, the Sixth Circuit determined that, notwithstanding some distinctly religious content, the position's activities primarily consisted of teaching "secular" subjects and therefore were not sufficiently religious. Put differently, based on an implicit measure of their *indoctrination quotient*, the court placed these activities on the secular side of the line between "indoctrination" and "mere education."

The Sixth Circuit's analysis bears out the Tenth Circuit's observation that this line is highly subjective and susceptible to abuse. The court's conclusion appears to have turned in part on its finding the teacher could recall only two times when she introduced the topic of religion into secular discussions, and that the distinct theological training and calling

of the teacher did not affect her duties. *Id.* at 780. But the court offers no measure for how much religion would have to be incorporated, or what that religion would look like. In fact, the extent of distinctly religious content in a particular activity is not a reliable indicator of the activity's religious character. Bible reading is a religious activity if performed out of a desire to know and obey God, but it is not if performed merely as a study of literature. Eating bread and drinking wine is a religious activity if performed as part of a communion service, but it is not if performed merely to satisfy physical needs or desires. Ingesting peyote and killing chickens are generally not religious activities, but they become so when conducted as a sacrament in certain religions. *Employment Division v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993). The purpose, not the content, is what matters.

More generally, the court's independent search for religious meaning requires not only a measure of each duty but also a weighing of these duties against each other. In this regard, the court concluded that the "religious" activities the teacher conducted throughout the day were not sufficient to "make her primary function religious." *Id.* at 780. Even assuming the court correctly identified the religious activities, the court offers no standard for how pervasive such activities must be. For instance, would it be sufficient if such activities consumed four of the seven hours of the day?

Perhaps inevitably, the court gets lost in its own search. For instance, the court asserted that the extent of "religious" activities was not sufficient because teachers who were not called or not Lutheran also conducted these religious activities. *Id.* at 780. But the court did not explain how such activities would be more religious, or make other "secular" activities more religious, if they were conducted only by "called" ministers. Similarly, the court also concluded that the teacher's primary duties were secular "because nothing in the record indicates that the Lutheran church relied on [her] as the primary means to indoctrinate its faithful into its theology." *Id.* at 781. There is no obvious connection between whether she was the primary means for indoctrination in the Lutheran church and the character of her duties. Is the court suggesting that if she were the "pope" of the Lutheran church, the forty-five minutes per day of "religious activities" would be sufficient?[6]

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[6] The court also appears to second guess the school's ecclesiology. In discounting her title as a "commissioned minister," the court reasoned that the fact that non-called teachers have the same duties would mean that the exception would apply to non-Lutheran ministers. *Id.* at 781. The court concluded that applying the exception in that way would be contrary to its underlying intention, which the court stated is "to allow religious organizations to prefer members of their own religion and to adhere to their own religious interpretations." *Id.* at 781. But the court cannot assume that the School's ecclesiology prohibits non-Lutheran ministers. Indeed, by imposing its understanding of who can serve as ministers under Lutheran ecclesiology, the

(Continued on following page)

The arbitrary nature of the court's search will inevitably favor some religious organizations over others based on each court's predilections. In addition, the very structure of the court's primary duties test favors organizations whose model of ministry leadership aligns with the court's standard. In other words, the standard imposes an orthodoxy on religious exercise.

This orthodoxy applies not only to the presumption as to the primary duties ministers perform, but also to the definitions of such duties. For instance, the standard requires courts to determine whether the duties include participation in "religious ritual and worship." *Id.* at 778. But as this court noted in *Widmar*, courts are ill-equipped to distinguish between religious worship and other types of religious activities. Further, religious worship may encompass "secular" activities. In *Maurer v. Young Life*, 774 P.2d 1317 (Colo. 1989), the Colorado Supreme Court upheld a determination by the Board of Assessment Appeals that camp property owned and operated by Young Life qualified for a religious worship exemption. The court cited the testimony of Young Life's president that:

> To us, skiing, horseback riding, swimming, opportunities to be with young people in a setting and in an activity that is wholesome

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court precludes the School's religious interpretation of its ecclesiology.

> is all a part of the expression of God in worship. There is no ["]we are now doing something secular, we are now doing something spiritual.["]

Id. at 1328. Based on *bona fide* evidence of a connection between Young Life's activities and Young Life's religious purposes and mission, the court concluded that:

> Although not all the activities conducted on the Young Life properties are inherently religious in nature, by considering the character of the owner and the competent evidence in the record that the uses of the properties were to advance in an informal and often indirect manner Young Life's purposes, the Board could and did conclude that any non-religious aspects of these activities were necessarily incidental to the religious worship and reflection purposes for which Young Life claimed the properties were used.

Id. at 1327 (emphasis added).

Again, the critical issue is purpose, not content. In this regard, the Sixth Circuit acknowledged that (i) the School "provides a Christ-centered education that helps parents by 'reinforcing bible principals [sic] and standards'," and (ii) the School describes its staff members as "fine Christian role models who integrate faith into all subjects." *Id.* at 772-73, 780. But the court improperly concluded that these factors did not transform her teaching into "religious activities." *Id.* at 780.

In fact, the evidence clearly establishes that the School's particular approach to teaching secular subjects furthers its religious mission. Because the teacher plays a leadership role in advancing this mission among the students, and because the *bona fide* nature of this role is supported by her training and her calling, her position is subject to the "ministerial exception."

CONCLUSION

This country has a long tradition of deference for churches and other associations formed around shared religious life and conviction. Our constitutional commitment to religious pluralism respects their duty to their religion and prohibits religious favoritism. For these reasons, *amici* respectfully request this Court to affirm the "ministerial exception" from laws that impose criteria on the selection by religious organizations of their *bona fide* ministry leaders. On this basis, the decision of the Sixth Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 10-553

IN THE

Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND CHERYL PERICH,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE AND INTERVARSITY CHRISTIAN FELLOWSHIP/USA IN SUPPORT OF PETITIONER AND URGING REVERSAL

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INTEREST OF AMICUS[1]

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have appeared frequently before the Court as counsel for parties or for amici.

A top priority for the ACLJ is the defense of religious freedom. The present case touches upon the crucial ability of churches and religious schools to make their own decisions, free of civil court interference, about the staffing of their religious education ministry. The ACLJ submits this brief in support of the petitioner religious school.

InterVarsity Christian Fellowship/USA ("InterVarsity") is a Christian campus ministry that establishes and advances witnessing communities of students and faculty. InterVarsity ministers to students and faculty through small group Bible studies, large gatherings on campus, leadership training, thoughtful discipleship, and conferences and events. InterVarsity ministers to 36,675 students annually and employs 987 full-time staff. Without the

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[1] The parties to this case have consented to the filing of this brief. The blanket consent letters of petitioner and of respondent Perich are on file with this Court. A copy of the consent letter on behalf of respondent EEOC is being filed herewith. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

ability to hire staff that adhere to the vision, core values, and doctrinal basis of the organization, InterVarsity could not effectively fulfill its mission and would lose its unique identity. The ministerial exception is vital to InterVarsity's religious liberty and free expression, as well as to the religious liberty and free expression of similarly-situated organizations.

SUMMARY OF ARGUMENT

The doctrine of constitutional avoidance, with its associated "clear statement" rule, is an important and established part of this Court's jurisprudence. Under the doctrine of constitutional avoidance, this Court should decline to read the Americans with Disabilities Act as applying to a church or religious school's hiring and firing of employees carrying out the church's religious educational ministry. Whether a similar avoidance doctrine precludes the state statutory claim at issue here as well is a question that should be relegated to the state judiciary.

ARGUMENT

Petitioner contends persuasively that the "ministerial exception" constitutionally bars the present employment discrimination suit from going forward. This amicus brief identifies an alternative route to the same conclusion: the doctrine of constitutional avoidance. As in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), this Court

should construe the Americans with Disabilities Act (ADA) not to apply to a religious institution's ministerial hiring and firing decisions. Having disposed of the sole federal claim in this case, this Court should remand the matter for relinquishment of jurisdiction over the remaining state claim. (The Michigan state courts are then likely to apply the same rule of constitutional avoidance to reject the state statutory claim.)

I. THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE MILITATES IN FAVOR OF REJECTING THE ADA CLAIM AS A MATTER OF STATUTORY CONSTRUCTION.

Petitioner is correct that the ministerial exception constitutionally bars the present suit. For similar reasons, this Court should construe the ADA not even to apply to the ministerial employment decisions of religious schools. Taking this interpretive route follows the well-trodden path of construing statutes to avoid serious constitutional questions.

> It has long been an axiom of statutory interpretation that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." . . . This approach, we said recently, "not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that

> Congress, like this Court, is bound by and swears an oath to uphold the Constitution."

Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 456 (1989) (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

This Court took exactly that approach in *NLRB v. Catholic Bishop*. That case, like this one, involved the applicability of a federal statute to teachers in religious schools. 440 U.S. at 491. There, as here, the schools provided both religious and secular instruction. *Id.* at 492 ("special religious instruction" plus "essentially the same . . . curriculum as public secondary schools"); *id.* at 493 ("traditional secular education" with religious orientation, plus "religious training"). There, as here, the schools raised First Amendment objections to government intrusion into the affairs of religious schools. *Id.* at 494, 500.

Invoking the doctrine of constitutional avoidance, *id.* at 500, this Court declared that "it is incumbent on us to determine whether the [federal government's] exercise of its jurisdiction here would give rise to serious constitutional questions." *Id.* at 501. If so, this Court would require a clear statement -- "the affirmative intention of Congress clearly expressed" -- before construing the statute to apply to such circumstances. *Id.* Finding "no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act," *id.* at 504, this Court "decline[d] to construe the Act in

a manner that could in turn call upon this court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses," *id.* at 507.[2]

The "clear statement rule" which this Court applied to the NLRA in *Catholic Bishop* applies as well to the ADA. *See Spector v. Norwegian Cruise Line, Ltd.*, 545 U.S. 119, 138-39 (2005) (plurality of Kennedy, J., joined by Stevens, Souter, & Thomas, JJ.) ("If the clear statement rule restricts some applications of the NLRA . . . it follows that the . . . application is also required under Title III of the ADA"); *id.* at 143 n.1 (Ginsburg, J., joined by Breyer, J., concurring) (agreeing with plurality on this point); *id.* at 149 (Scalia, J., joined by Rehnquist, C.J., & O'Connor, J.) (agreeing that the clear statement rule applies to the ADA). This clear statement rule serves a valuable purpose: "'[C]lear statement rules ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation.'" *Sossamon v. Texas*, 131 S. Ct. 1651, 1661 (2011) (quoting *Spector*, 545 U.S. at 139

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[2] This Court did not find a sufficiently clear statement in the "[a]dmittedly . . . broad terms" of the NLRA, *id.* at 504, in the legislative adoption of a *different express exemption* to address certain religious concerns, *id.* at 506, in the statutory enumeration of other exceptions *not* including church-operated schools, *id.* at 511 (Brennan, J., dissenting), and in the prior rejection of legislation that would have provided the exception for religious educational organizations, *id.* at 512-13 (Brennan, J., dissenting). In light of these details, it is plain that the ADA likewise contains no "clear statement" that would pass muster under *Catholic Bishop*.

(plurality)).

Here, there can be no dispute that applying the ADA would, at a minimum, raise serious constitutional questions. Petitioner has demonstrated this at length. In addition, the text of the ADA, were it to apply to employees with religious ministerial duties, would invite a nightmare of entanglement with religious questions.

The ADA requires covered employers to make "reasonable accommodations" to disabled individuals "unless . . . the accommodation would impose an undue hardship on the operation of the business or entity." 42 U.S.C. § 12112(a)(5)(A). The ADA defines "undue hardship" as follows:

> (10) Undue hardship.
>
> (A) In general. The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).
>
> (B) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include--
>
> (i) the *nature* and cost *of the accommodation* needed under this Act;
>
> (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or *the*

> *impact otherwise of such accommodation upon the operation of the facility*;
>
> (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; *the* number, *type*, and location *of its facilities*; and
>
> (iv) *the type of operation or operations of the covered entity, including the* composition, structure, and *functions of the workforce of such entity*; *the* geographic separateness, *administrative*, or fiscal *relationship of the facility* or facilities in question *to the covered entity*.

42 U.S.C. § 12111(10) (emphases added). Were the ADA to be applied to ministerial employees, the highlighted portions of this definition foreseeably would require, in case after case, an assessment of religious matters. Does the "nature of the accommodation" create a religious hardship (e.g., dispensing with a strict requirement of wheat-based communion hosts or of wine because of a lay minister's gluten intolerance or alcoholism)? How can a secular court assess the "impact" of an accommodation upon "the operation" of a religious school, when part -- perhaps the most significant part -- of the adverse impact is a restraint on, or conflict with, rules of religious doctrine or discipline? *Cf. Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 402 (1st Cir. 1986) (en banc) (opinion of Breyer, J.) (invoking *Catholic Bishop* because, *inter alia*, "philosophical, theological and church-related moral issues would

seem . . . likely to permeate the educational process"). Can a secular court fully evaluate the "type of operation" or "function" of an entity with a religious mission, for purposes of assessing "undue hardship"? Where theology or canonical law governs the "administrative . . . relationship" of a church to a school, can a civil court resolve disputed questions over the scope of that relationship?

This is precisely the kind of constitutionally treacherous terrain the clear statement rule is designed to avoid.

> Implied limitation rules avoid applications of otherwise unambiguous statutes that would intrude on sensitive domains in a way that Congress is unlikely to have intended had it considered the matter. In these instances, the absence of a clear congressional statement is, in effect, equivalent to a statutory qualification saying, for example, "Notwithstanding any general language of this statute, this statute shall not apply extraterritorially"; or ". . . this statute shall not abrogate the sovereign immunity of nonconsenting States"; or ". . . this statute does not regulate the internal affairs of foreign-flag vessels."

Spector, 545 U.S. at 139 (plurality). Here, the "internal affairs" are of a church school, not a ship, but the concern is no less valid.

In *Catholic Bishop*, this Court steered clear of the

looming constitutional shoals by construing the NLRA not to apply, "in the absence of a clear expression of Congress' intent," to teachers in church-run schools. *Id.* at 507. Charting the same course here resolves this case, at least as to the federal ADA claim, without the need definitively to resolve the constitutional dimensions of the ministerial exception.

II. THE STATE RETALIATION CLAIM SHOULD BE DISMISSED WITHOUT PREJUDICE TO REFILING IN STATE COURT.

This case involves a state statutory claim as well. While the constitutional avoidance doctrine authorizes this Court conclusively to interpret the federal ADA, the proper scope of Michigan statutes is ultimately a matter for the state courts of Michigan. Hence, while the preceding discussion, *supra* § I, resolves the EEOC's only claim (*viz.*, under the ADA), intervenor respondent Perich's state statutory retaliation claim remains.

There is good reason to believe that the state courts of Michigan would likewise apply the *Catholic Bishop* approach to reject the state statutory claim here. *See, e.g.*, *People v. Tombs*, 472 Mich. 446, 456-57, 697 N.W.2d 494, 500 (2005) (applying constitutional avoidance and clear statement rules). In fact, a state appeals court in Michigan has already expressly followed *Catholic Bishop* in rejecting state labor board jurisdiction over religious schools. *Michigan Educ. Ass'n v. MERC Christian Brothers Institute of Michigan*, 267 Mich. App. 660, 706 N.W.2d 423 (2005).

In the end, of course, this question is for the state courts to decide.

Here, once the federal claim is dismissed, the district court may decline to exercise supplemental jurisdiction over the state retaliation claim. 28 U.S.C. § 1367(c)(3). *E.g.*, *Fox v. Vice*, slip op. at 2, No. 10-114 (U.S. June 6, 2011) (noting that after dismissing federal claims on summary judgment, district court declined to exercise supplemental jurisdiction over remaining state-law claims). Another alterative would be for the lower federal courts to certify the question to the Michigan state supreme court. Mich. Ct R. 7.30(B)(1). Or, the federal courts may themselves construe the statute for purposes of this case, albeit without binding the state courts on the question.

Regardless of which approach the lower courts take, the presence of the state claim here is no obstacle to reversal and remand in the case at bar pursuant to *Catholic Bishop*.

CONCLUSION

This Court should reverse the judgment below.

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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In The
Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL, *PETITIONER,*
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISION, *et al.,* ***RESPONDENTS.***

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE AMERICAN HUMANIST ASSOCIATION AND AMERICAN ATHEISTS, INC., AMERICAN ETHICAL UNION, ATHEIST ALLIANCE OF AMERICA, MILITARY ASSOCIATION OF ATHEISTS AND FREETHINKERS, SECULAR STUDENT ALLIANCE, AND SOCIETY FOR HUMANISTIC JUDAISM, IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE* [1]

This *amici curiae* brief in support of the Respondents is being filed on behalf of the American Humanist Association, American Atheists, Inc., the American Ethical Union, the Atheist Alliance of America, the Military Association of Atheists and Freethinkers, the Secular Student Alliance, and the Society for Humanistic Judaism. *Amici* comprise a diverse array of secular organizations that advocate on behalf of religious liberty and equality and offer a unique viewpoint concerning the history of religious freedom and civil liberties and rights in the United States of America.

This case concerns core humanist and atheist interests regarding the equal, fair and just application of our anti-discrimination laws to all employers, both secular and religious.

Amici wish to bolster the principle of religious neutrality—that government may not prefer religion over nonreligion—by informing the Court that we support the Sixth Circuit's decision vacating the District Court's order entering summary judgment on behalf of the defendant and instructing the

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[1] *Amici* file this brief with the consent of all parties. Consents of the parties are on file with the Clerk of the Court. No counsel for any party in this case authored in whole or in part this brief. No person or entity, other than *amici*, their members or their counsel made a monetary contribution for the preparation or submission of this brief. The *amici* have no parent corporations, and no publicly held companies own 10% or more of their stock.

District Court to rule on the merits of the plaintiff's claim. We do not, however, support the Sixth Circuit's application of the ministerial exception because this doctrine is based on a misreading of the Constitution. A decision of this Court recognizing the ministerial exception would have the constitutionally impermissible effect of denying equal protection of the laws to the employees of religious organizations and of advancing religion by creating special rights for religious defendants, and in so doing undermine the rule of law.

SUMMARY OF ARGUMENT

One of the foundational principles of a just society is the rule of law. This principle ensures that the democratic judgments regarding important social norms and values embodied in the law are enforced equally against all, whether rich or poor, powerful or weak, famous or humble.

Equality before the law also means that our laws are enforced equally against religious and nonreligious citizens. As this Court has emphasized, religious defendants do not have a special right to ignore a law just because they claim that complying with it would conflict with their religion:

> "Laws . . . are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[2]

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[2] *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990) (quoting *Reynolds* v. *United States*, 98 U. S. 145 (1879) (rejecting the argument that a law against polygamy could not be constitutionally applied to those whose religion was said to command the practice)).

The Americans with Disabilities Act[3] (the "ADA"), like other federal statutes prohibiting discrimination in employment, such as Title VII of the Civil Rights Act of 1964 ("Title VII"),[4] was enacted to ensure fair treatment of and equal opportunity for groups of citizens who long had been denied these unjustly.

Despite the clarity with which this Court spoke in *Smith* as to the rule of law, lower federal courts have taken it upon themselves to invent and apply a doctrine that gives religious employers a special right to ignore federal antidiscrimination statutes. This so-called "ministerial exception" is said to require those courts to permit religious employers to discriminate on the basis of race, gender, age[5] or disability if done in connection with the employment of an employee deemed "ministerial."

Despite the assertions of its creators, this judicially-created doctrine is unjustified by the First Amendment's Religion Clauses.[6] Because the ADA and Title VII already contain an express exception permitting *religious* discrimination by religious employers, the only thing that the ministerial exception adds is to permit them to discriminate on

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[3] 42 U.S.C. §12101 *et seq*.

[4] 42 U.S.C. §2000e *et seq*.

[5] Discrimination on the basis of age is prohibited by the Age Discrimination in Employment Act (the "ADEA"), 29 U.S.C. §621 *et seq*.

[6] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. Amend. I.

the basis of race, gender, or disability *without* religious justification. Conduct undertaken without religious motivation, however, is not protected by the Free Exercise Clause.

In addition, the ministerial exception conflicts with another constitutional value of the highest order: the Fourteenth Amendment's guarantee of equal protection of the laws.[7] In addition to undermining statutes that protect equality, the creation and application of the ministerial exception doctrine by the courts, in and of itself, directly violates the Equal Protection Clause by judicially enforcing a private right to discriminate.

Finally, the specific manner in which the ministerial exception operates in the judicial context, by denying to courts jurisdiction to hear employment discrimination cases, unjustly denies to victims of illegal discrimination their day in court.

The ministerial exception doctrine has no basis in those provisions of the Constitution which are said to require it. Instead, it violates the constitutional rights of those to whom it denies redress for violations of federal law. This Court should therefore reject it and allow courts to adjudicate suits challenging illegal discrimination by religious employers in a manner, described herein, consistent with the First Amendment.

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[7] The Equal Protection Clause provides that a state cannot "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, §1.

ARGUMENT

I. THE "MINISTERIAL EXCEPTION" IS NOT JUSTIFIED BY THE FIRST AMENDMENT.

Federal statutes such as the ADA and Title VII prohibit discrimination in employment on the basis of race, gender, religion or disability.[8] These statutes apply to religious employers but expressly provide them with exemptions that permit them, if they so choose, to discriminate on the basis of religious views with regard to any employment decision.[9]

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[8] The ADA generally prohibits employers from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. §12112(a). Title VII generally prohibits employers from "discriminat[ing] against any individual with respect to . . . employment, because ["a motivating factor" for such decision was] . . . such individual's race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(a) and (m).

[9] The ADA provides that it does not "prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such [entity] of its activities." It further provides that "under [the ADA], a religious organization may require that all applicants and employees conform to the religious tenets of such organization." 42 §U.S.C. 12113(c). Title VII exempts from its general requirement of non-discrimination any "religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [entity] of its activities." 42 U.S.C. 2000e-1(a).

Notwithstanding these express statutory exceptions, however, the lower federal courts have taken it upon themselves to add a further exception of their own creation: the so-called "ministerial exception." This judicial doctrine requires courts to permit religious employers to discriminate not only on the basis of religion but also on *any* basis (including discrimination on the basis of race, gender, age or disability in violation of the ADA, Title VII or the ADEA[10]) when such action is in connection with the employment of a "minister" or similar employee, often broadly defined. The ministerial exception is a purely judicial creation said by these courts to be required by the Free Exercise Clause and/or the Establishment Clause of the First Amendment. It is applied to bar federal courts from even hearing and deciding a case regarding ministerial employment.[11]

In addition to slamming the courthouse door in the face of the victims of illegal discrimination in employment, the ministerial exception has also been used to bar state common law tort claims against religious defendants for their employment-related conduct. For example, it has been used to shield the

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[10] The ADEA generally prohibits employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1).

[11] The lower courts are split as to whether the ministerial exception is available to be raised by motion pursuant to Rule 12(b)(1) (lack of subject matter jurisdiction) or 12(b)(6) (failure to state a claim) of the Federal Rules of Civil Procedure. A successful motion under either rule results in the dismissal of the plaintiff's case before discovery and trial.

Catholic Church from suits relating to its employment of priests who have sexually abused children, leaving their victims without a legal remedy. See *e.g. Doe v. Roman Catholic Archdiocese of St. Louis*, 2011 WL 2620382 (Mo. App. E.D.) (holding that "the First Amendment bar[s] the assertion of tort claims against a religious institution based on its alleged negligence in supervising, retaining, or hiring sexually abusive clerics," citing *Gibson v. Brewer*, 952 S.W. 2d 239 (Mo. 1997) (holding that permitting a similar tort suit against the Catholic Church would unconstitutionally "inhibit religion and result in one model of supervision" of employees[12])).

A. The Free Exercise Clause does not give religious employers a special right to be exempt from complying with laws, such as federal anti-discrimination statutes, that do not discriminate against religious conduct.

This Court made clear in *Smith* that the Constitution requires that our laws apply to and govern the conduct of all equally, religious and secular alike. The Free Exercise Clause does not give religious defendants a special right to ignore a law by claiming that complying with it conflicts with their religion. As this Court recognized, doing so would undermine the rule of law, permitting anyone who wants to break the law able to claim some

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[12] Presumably, this would be the "model of supervision" ***that does not result in the sexual molestation of children***. It is simply not an outrageous state intrusion to insist that a religious organization follow this particular "model" of employment practices.

"religious" reason that he must be allowed to do so. Pursuant to *Smith*, a Free Exercise Clause challenge to a law is *only* available if the law is not neutral and of general applicability (*i.e.* only if it discriminatorily singles out particular religious conduct *as such* for regulation). If a law is "not specifically directed at . . . religious practices," it does not violate the Free Exercise Clause. *Id.* at 878. In other words, it is only when "the object of a law is to infringe upon or restrict practices *because of* their religious motivation, [that] the law [is] . . . not neutral," and therefore unconstitutional. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (emphasis added).

Accordingly, when considering an asserted Free Exercise Clause defense to the application of a law to a defendant who claims that the law inhibits in some way his free exercise of religion, a court, applying the *Smith* test, must reject this challenge unless the defendant can prove that the law was enacted with the purpose of discriminating against a particular religious practice because of its religious nature. Religion-neutral laws that incidentally burden religion are not unconstitutional.

In refusing to require courts to undertake a strict scrutiny analysis of any law to which a defendant asserts a right to a religious exemption, this Court reasoned that doing so "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind," noting in particular that this would include "laws providing for equality of opportunity for the races." *Id.* at 889. The Court

unequivocally concluded that "[t]he First Amendment's protection of religious liberty does not require this." *Id.*

By way of comparison, this Court further noted that applying strict scrutiny to racial discrimination produces as a result the "constitutional norm" of "equality of treatment," while doing so to privilege free exercise rights would produce the "constitutional anomaly" of a "private right to ignore generally applicable laws." *Id.* at 886.

This Court has repeatedly shown courage and resolve in upholding the validity of *Smith's* ruling in favor of the rule of law in the face of a political backlash led by religious special interest groups seeking special rights to break the law.[13] We simply

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[13] Following *Smith*, Congress enacted the Religious Freedom Restoration Act ("RFRA"), which this Court struck down as applied to the states by *City of Boerne v. Flores*, 521 U.S. 507 (1997), but which remains applicable to federal action (see *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006)). RFRA provides that "a person whose religious exercise has been burdened in violation [thereof] may assert that violation as a claim or *defense* in a judicial proceeding and obtain appropriate relief *against a government*." 42 U.S.C. 2000bb-1(c) (emphasis added). The parties to this case have *not* asserted it as a defense, and so it is inapplicable here. RFRA only permits a court to rely on such a defense, when invoked, "to provide relief against a government," not against a private plaintiff, barring its application in the vast majority of religious employer discrimination suits between private parties. Even if it were applicable, RFRA requires a "case-by-case consideration of religious exemptions to generally applicable rules," not a blanket exemption that operates to prevent a court from hearing and deciding a case, as the ministerial exception does. *Gonzales* at 436.

ask that it do so once again, and do so with respect to laws which the Court has already expressly recognized as applying to religious defendants.

Applying the *Smith* test, antidiscrimination statutes such as the ADA are neutral laws of general applicability, and thus do not violate the Free Exercise Clause. These laws apply to virtually all employers and exist to eliminate the significant social harm caused by employment discrimination. They do not single out religion for negative treatment or have the purpose of suppressing religious practice. To the contrary, the ADA and Title VII provide express exemptions permitting *religious* discrimination by religious employers as an accommodation of their supposed special needs. Courts that have considered this question have reached the same conclusion.[14]

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[14] See *Smith v. Raleigh Dist. of North Carolina Conference of United Methodist Church*, 63 F. Supp. 2d 694 (E.D.N.C. 1999), (holding that "Title VII is a neutral, generally applicable federal law"); *Lukaszewski v. Nazareth Hosp.*, 764 F. Supp. 57 (E.D. Pa. 1991) (holding that "[t]he ADEA is a neutral law of general applicability"); *Stouch v. Brothers of Order of Hermits of St. Augustine*, 836 F. Supp. 1134 (E.D. Pa. 1993) (same); A female former associate pastor brought an action against her church and pastor under state civil rights act for sexual harassment and retaliation. *Black v. Snyder*, 471 N.W. 2d 715 (Minn. Ct. App. 1991) (holding that state law against sexual harassment was "valid, generally applicable, and facially neutral"). See also Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 Fordham L. Rev. 1965, 1983 (2007) (stating that "[u]nder *Smith* . . . the free exercise clause should not shield religious practices from Title VII.").

This conclusion accords with this Court's recent decision in *Christian Legal Soc. Chapter of the University of California v. Martinez*, 130 S. Ct. 2971 (2010). In *CLS*, the Court rejected an assertion that the Free Exercise Clause required a state school to exempt a religious group that sought to discriminate in choosing its members from the school's nondiscrimination policy, stating that *Smith* "unequivocally" required this result. *Id. at* 2993 n.24. The Court expressly contrasted this policy to the statutory exemption provided by Title VII for religious discrimination by religious employers.[15] The Court noted that "[i]n seeking an exemption from [a governmental nondiscrimination] policy, [the religious plaintiff] . . . seeks *preferential*, not equal, treatment; it therefore cannot moor its request for accommodation to the Free Exercise Clause." *Id.* at 2995 n.27 (emphasis added).

In this case, the religious defendant similarly demands a special, judicially-mandated right to an exemption from a rule requiring nondiscrimination based on an assertion that the Free Exercise Clause commands it. The result should be no different. *Smith* was clear in its command: no free exercise right to break the law exists. The ADA and other antidiscrimination statutes deserve to be, and under

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[15] It is not the role of judges to create free exercise exceptions to statutes. Although Congress may do so, as it did in crafting limited exceptions in the ADA and Title VII permitting religiously motivated discrimination by religious employers, this does not mean that such exceptions are "constitutionally required, and that the appropriate occasions for [their] creation can be discerned by the courts." *Smith* at 890.

Smith must be, enforced fairly, and equally, against all.

B. The Free Exercise Clause does not create an inviolable right to church autonomy.

In seeking to justify their creation of the ministerial exception doctrine, many lower courts have overstated the holdings of some of this Court's cases. These cases, all of which predate *Smith*, deal with the role of civil courts in resolving internal church disputes and assert a supposed church right to freedom from such involvement.[16] See *e.g. Tomic v. Catholic Diocese of Peoria*, 442 F. 3d 1036, 1037 (7th Cir. 2006) (asserting that "[f]ederal courts are secular agencies . . . [that] do not exercise jurisdiction over the internal affairs of religious organizations"). These courts oddly cite as support for this position *Jones v. Wolf*, 443 U.S. 595 (1979) (holding that courts may resolve church property disputes by applying neutral principles of civil law),[17] *Serbian Eastern Orthodox Diocese for the*

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[16] Although *Smith* involved an individual, there is no support in the Free Exercise Clause, or this Court's cases interpreting it, for drawing a distinction between the rights it grants to religious individuals and those it grants to religious organizations; its terms make unconstitutional any "prohibit[ion of] the free exercise [of religion]." Religious organizations, of course, are composed of individuals, and the same concerns regarding the rule of law that animated *Smith* apply: allowing a religious organization complete autonomy in its internal affairs permits it, or its members acting on its behalf, to become a law unto itself.

[17] To the extent that any of the cases preceding *Jones* could be read to require deference to church authority in resolving disputes, this was overruled. See *Jones* at 605 (stating that

United States and Canada v. Milivojevich, 426 U.S. 696 (1979) (holding that courts may resolve church disputes but in so doing must accept a church's determination "as to issues of religious doctrine"), *Kedroff v. St. Nicholas Cathedral of the Russian Eastern Orthodox Church in the United States*, 344 U.S. 94 (1952) (same), *Gonzalez v. Roman Archbishop of Manila*, 280 U.S. 1, 16 (1929) (holding that civil courts have jurisdiction to hear church disputes but must accept as conclusive church rulings on "matters purely ecclesiastical"), and *Watson v. Jones*, 80 U.S. 679 (1872) (stating that "courts when . . . called on [to resolve a dispute involving a church] must perform their function as in other cases" but they tr[y] the civil right, and no more, taking the ecclesiastical decisions . . . as it finds them").

These cases involve disputes over church property[18] and pit one faction of a church against another, not the church against the state. They do not involve an attempt by the state to enforce a neutral law of general applicability governing church

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"[w]e cannot agree that the First Amendment requires . . . a rule of compulsory deference to religious authority in resolving church property disputes.")

[18] The one case, to involve something slightly different than church property *per se*, turned on an interpretation of estate and trust law. See *Gonzalez* at 16 (stating that "the fact that the property of the chaplaincy was transferred to the spiritual properties of the Archbishopric affects not the jurisdiction of the court, but the terms of the trust.") It did not involve the First Amendment and so cannot be read to stand for the proposition that the Religion Clauses require a right to church autonomy. To the contrary, the court held that civil courts had jurisdiction to resolve the dispute at issue.

conduct. Rather than supporting the overblown reading given to them by courts such as the Seventh Circuit in *Tomic*, these cases stand instead for the common proposition that "[t]here can be little doubt about the general authority of civil courts to resolve" disputes involving religious organizations, but in doing so such courts are prohibited by the Religion Clauses "from resolving [such] . . . disputes *on the basis of religious doctrine.*" *Jones* at 602 (citing *Milivojevich*, emphasis added). Courts instead "defer to the resolution of religious doctrine" by the church at issue, thereby avoiding "completely [any] . . . entanglement" concerns. *Id.* at 602, 603.

This Court in *Jones* also expressly and conclusively rejected the proposition, advanced by the dissent in that case, that "civil courts must defer to the 'authoritative resolution of a dispute within the church itself'" to comply with the First Amendment. *Id.* at 605. This radical concept of complete autonomy in internal church affairs is without basis in the Religion Clauses, which require no such "compulsory deference to religious authority." *Id.* On the contrary, applying "neutral principles" of civil law to church disputes "cannot be said to 'inhibit' the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, *hire employees*, or purchase goods." *Id.* at 606 (emphasis added).

This idea that the "Religion Clauses . . . are meant to protect churches and their members from civil law interference," advanced by the *Jones* dissent, was rightly rejected. *Id.* at 613 n.2. This is

because "[c]ivil courts do not inhibit the free exercise of religion merely by opening their doors to disputes" involving churches. *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969). The only restriction that the First Amendment imposes on such courts is that they resolve such "disputes without resolving underlying religious controversies over religious doctrine." *Id.*

In a secular state such as ours, religious organizations are not above the law and civil courts do not decide questions of religious doctrine. Our courts, however, have the power and duty to resolve legal disputes involving religious organizations and individuals by applying the civil law, just as they do in cases involving secular organizations and individuals. If, in the course of doing so, a court encounters a disputed question of religious doctrine, the resolution of which is necessary to decide the case, it accepts the resolution of this issue provided by the religious organization without further inquiry. It then proceeds to determine the legal rights of the parties and decide the case. In so doing, it complies with the Constitution. See *Jones*.

C. The Establishment Clause offers no basis for the ministerial exception because it exists to ensure that the state remain secular, not to grant special rights to religion.

Some lower courts have justified their creation of a ministerial exception by asserting that it is

required by the Establishment Clause.[19] These courts focus on the third prong of the test first described by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which warned that "excessive entanglement" of government with religion violates the Establishment Clause. In doing so, they miss the bigger picture: their reading turns the Establishment Clause on its head, with the perverse result that a constitutional provision intended to keep the state secular instead is read to require the state to privilege religion. (State interference with the free exercise of religion is, of course, already restricted by the Free Exercise Clause, rather than the Establishment Clause, and courts therefore analyze it by applying the *Smith* test, not the *Lemon* test).[20]

Assuming the continuing validity of the entanglement test,[21] which has been inconsistently

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[19] See *e.g. Rayburn v. General Conf. of Seventh-Day Adventists*, 772 F. 2d 1164, 1169-70 (4th Cir. 1985).

[20] The threat of entanglement of church and state in this context is better seen as an issue of free exercise rather than establishment. The threat is not the government will *endorse* a particular religious doctrine in settling a dispute involving a religious organization in violation of the Establishment Clause, but that it might *impose its interpretation* of that doctrine on a dissenting religious organization in resolving that dispute in violation of the right of the religion to develop and articulate its own theology under the Free Exercise Clause.

[21] Members of this Court have criticized the validity of the entanglement prong of the *Lemon* test as a separate element of Establishment Clause jurisprudence. See *e.g. Bowen v. Kendrick*, 487 U.S. 589, 616 (1988) (stating that "the 'entanglement' prong of the *Lemon* test has been much criticized over the years."); *Committee for Public Ed. & Religious Lib. v. Nyquist*, 413 U.S. 756, 822 (1973) (White, J.,

applied (or not) by this Court, not all entanglement between church and state violates the Establishment Clause. Because "[i]nteraction between church and state is inevitable," this Court has "always tolerated some level of involvement between the two. Entanglement must be 'excessive' before it runs afoul of the Establishment Clause." *Agostini v. Felton*, 521 U.S. 203, 233 (1997) (citation omitted); see also *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 674, 676 (1970) (stating that the "complexities of modern life inevitably produce some contact" between church and state and so the "test is inescapably one of degree") and *Larkin v. Grendel's Den, Inc.* 459 U.S. 116, 123 (1982) (stating that some "entanglement between church and state authority is inevitable in a complex modern society").

In light of this inevitable contact and interaction between institutions of church and state, this Court has made clear that "excessive entanglement" is something more than a single, discrete instance of state involvement in the affairs of a religious organization. It is instead a "comprehensive, discriminating, and continuing state surveillance" amounting to an "enduring

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dissenting) (questioning the validity of entanglement as a separate "constitutional criterion"); *Aguilar v. Felton*, 473 U.S. 402, 422 (1985) (O'Connor, J., dissenting) (questioning "the utility of entanglement as a separate Establishment Clause standard in most cases"); and *Wallace v. Jaffree*, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting) (stating that the prohibition against excessive entanglement should not be read to "ignore the myriad state administrative regulations *properly placed* upon sectarian institutions") (emphasis added).

entanglement." *Lynch v. Donnelly*, 465 US 668, 684 (1984) (quoting *Lemon*).

A court case against a religious defendant under an antidiscrimination statute such as the ADA does not involve such "continuing state surveillance." It involves a discrete factual inquiry. In hearing such a case, a court need not resolve questions of religious doctrine. Rather, it can (and should) focus on a factual inquiry into the motivation for the alleged discrimination. If the plaintiff's injury was caused by and grounded in religious doctrine, the court may, applying the *statutory* exception permitting such discrimination, conclude that the plaintiff has failed to state a claim under the statute and dismiss the case. If the factfinder concludes following trial, however, that the plaintiff's injury was instead motivated by animus against a class otherwise protected by the statute, the court can proceed to judgment. In neither instance must the court resolve a disputed religious question; if such a question arises, it should simply defer to the resolution of such theological question provided by the church defendant.

A purely factual judicial inquiry, limited in time and scope to a single instance of reviewing the past discriminatory action of the defendant toward the plaintiff, is simply not the sort of "comprehensive and continuing state surveillance" that *Lemon* excessively entangles the state with a religious organization.

As this Court itself has recognized, the state does not excessively entangle itself with a religious

entity merely by investigating its workplace practices in response to allegations of illegal employment discrimination. See *Ohio Civil Rights Comm'n v. Dayton Christian Sch.*, 477 U.S. 619 (1986). In *Dayton*, a religious school argued that an exercise of jurisdiction over it to investigate and enforce a statute prohibiting sex discrimination would violate the Religion Clauses, asserting that the exercise of jurisdiction would result in "excessive entanglement" with religion. *Id.* at 622. This Court disagreed, stating: "the [state] violates no constitutional rights by merely investigating the circumstances of [the plaintiff's] discharge in this case, if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge." *Id.* at 628. The Court reached a similar conclusion in *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 305-6 (1985), holding the non-entanglement principle "does not exempt religious organizations from such secular governmental activity" as the requirements of the Fair Labor Standards Act because such "factual inquiries . . . bear no resemblance to the kind of government surveillance the Court has previously held to pose an intolerable risk of government entanglement."

Accordingly, judicial investigation of alleged employment discrimination, limited in scope to factual inquiries and in time to the particular case before a court, does not amount to excessive entanglement of the state with religion in violation of the Establishment Clause. This conclusion makes eminent sense in light of the overarching purpose of

the Establishment Clause: to prevent government promotion of religion.

In fact, turning to the ministerial exception itself (rather than the application of antidiscrimination statutes to religious employers that it stymies, discussed above), the judicial invention and application of the doctrine itself raise serious Establishment Clause concerns.

In addition to the prohibition against entanglement discussed above, any governmental action "which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose [and not] . . . advance . . . religion in its principal or primary effect." *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989), citing *Lemon*. This means that government cannot "advance," "promote," "endorse," "prefer" or "favor" religion. *Id.* at 590-593. Underlying this, as "the touchstone for our [Establishment Clause] analysis[,] is the principle that the First Amendment mandates governmental neutrality between religion and . . . nonreligion." *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005).

A statute that expressly grants a special exemption to religious groups from a restriction otherwise imposed on secular entities may or may not be a permissible "accommodation" of religion.[22]

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[22] Note that courts, when responding to a Free Exercise Clause claim that a statute *fails* to sufficiently accommodate religion, as in this case, are to conduct their analysis under *Smith*. If the statute is neutral and generally applicable, a court cannot

This Court has emphasized that "[t]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Lee v. Weisman*, 505 U.S. 577, 587 (1992). Accommodation is permitted only when it "alleviates *exceptional* government-created burdens on private religious exercise." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (emphasis added). An accommodation which "conveys a message of endorsement" of the religious practice being accommodated advances religion in violation of *Lemon*. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring).

And, "[o]f course, in order to perceive government action as a permissible accommodation of religion, there must in fact be an identifiable burden *on the exercise of religion* that can be said to be lifted by the government action." *Amos* at 348 (O'Connor, J., concurring) (emphasis in original). Because the ministerial exception is broader than the statutory exemption of religious discrimination by religious employers in the ADA and Title VII,[23] it applies to discrimination that almost always has no religious basis. Unless a church's religious doctrine requires discrimination on the basis of race, gender, age or disability, such discrimination cannot be said to be part of the free exercise of religion when it is

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create a religious exemption that the legislature has not. *Smith* at 890.

[23] This Court upheld the narrow exemption granted by Section 702 of Title VII in *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987).

not, by definition, undertaken on the basis of religious views.

By providing an exemption for religious organizations that protects illegal conduct not required by religious views, the ministerial exception provides those religious organizations "with a legal weapon that no atheist or agnostic can obtain," and that amounts to "governmental preference for religion" in violation of the Establishment Clause. *City of Boerne v. Flores*, 521 U.S. 507, 537 (1997) (Stevens, J., concurring).

D. The Free Speech Clause does not require the ministerial exception.

Because "[a]n individual's freedom to speak [and] to worship . . . could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed," this Court has found to be implicit in the First Amendment a right to expressive association. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).

This freedom to associate also "plainly presupposes a freedom not to associate." *Id.* at 623. This "right . . . is not, however, absolute. Infringements on [it] may be justified by regulations adopted to serve compelling state interests" so long as such regulations are narrowly tailored. *Id.*

The state's interest in "eradicating [private] discrimination" is, as this Court has repeatedly recognized, just such a "compelling interest of the

highest order." *Id.* at 623, 624.[24] This interest recognizes "the importance, both to the individual and to society, of removing barriers to economic advancement and . . . social integration that have historically plagued certain disadvantaged groups." *Id.* at 626.

The ministerial exception may be characterized as a First Amendment right to discriminate in choosing the members of a private organization as an act of religious expressive association. Under *Roberts*, however, this does not end the analysis. Because eradicating race and gender discrimination is clearly a compelling state interest, it justifies the application of federal statutes such as Title VII to religious employers despite the incidental burdens this may place on their right to expressive association.[25] The

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[24] See also *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 17 n.5 (1988) (recognizing "the State's 'compelling interest' in combating invidious discrimination" when considering a challenge to an antidiscrimination law on expressive association grounds) and *Board of Directors of Rotary Intern. v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (holding that the application of a state law to require a Rotary Club to admit women did not violate the right of expressive association because, "even if [it] does work some slight infringement on . . . members' right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women"). *Duarte* cited *Buckley* v. *Valeo*, 424 U.S. 1, 25 (1976) (*per curiam*) as standing for the proposition that the "right of association may be limited by state regulations necessary to serve a compelling interest unrelated to the suppression of ideas."

[25] In refusing to permit an application of a state's public accommodations law to require that the Boy Scouts admit a

compelling nature of this interest is not diminished by the religious nature of the defendant. See *Bob Jones University v. U.S.*, 461 U.S. 574, 604 (1983) (holding that an IRS decision to refuse to grant tax-exempt status to a university that racially discriminated on the basis of its religious views did not violate the Free Exercise Clause because the government's compelling interest in eradicating discrimination "substantially outweighs *whatever burden* denial of tax benefits places on [the university's] exercise of their religious beliefs") (emphasis added).

In addition, religious organizations that do not have religious beliefs *requiring* discrimination on a

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homosexual member, this Court noted that its decision in *Roberts* relied on a conclusion that the defendants in that case had not demonstrated "any serious burdens on the male members' freedom of associative expression" that would result from a decision to require them to admit women to their organization. *Boy Scouts of America v. Dale*, 530 U.S. 640, 680 (2000). In applying these cases to the ministerial exception, it should be noted that (1) religious defendants in a case involving employment discrimination *not* based expressly on religious doctrine (such as this one) cannot assert that state prohibition of such discrimination causes them to violate an associational value and (2) this Court has applied a lower level of scrutiny to discrimination on the basis of sexual orientation, which was at issue in *Dale*, than it has to that based on race or gender. See *Romer v. Evans*, 517 U.S. 620 (1996). In addition, this Court, in considering the spectrum of associational interests protected by the First Amendment, has placed those relating to employment decisions on the least important and protected end thereof, noting that "the Constitution undoubtedly imposes constraints on the state's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees." *Roberts* at 618.

basis other than religion cannot invoke the right to expressive association to justify such discrimination. Absent such beliefs, such discrimination cannot be said to be a part of the group's right to express its views regarding its discriminatory beliefs under the First Amendment. One does not have a right to expressive association in connection with views one does not hold.

II. THE MINISTERIAL EXCEPTION CONFLICTS WITH THE CORE VALUES OF THE FOURTEENTH AMENDMENT.

A. The ministerial exception conflicts with a national value of the highest order: equality.

The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, §1. The same restriction applies to federal action under the Fifth Amendment.[26] Under the Equal Protection Clause, state action that treats persons differently on the basis of suspect classifications is subject to strict scrutiny. See *e.g. Plyler v. Doe*, 457 U.S. 202, 216-17 (1982). Suspect

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[26] The Due Process Clause of the Fifth Amendment "forbid[s] [federal] discrimination that is 'so unjustifiable as to be violative of due process.'" *Schneider v. Rusk*, 377 U.S. 163, 168 (1964) (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)); see also *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (stating that "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment") (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975). For simplicity's sake this brief refers to these rights interchangeably.

classifications include race and religion.[27] Governmental discrimination on the basis of gender is subject to similar heightened judicial scrutiny. See *e.g. U.S. v. Virginia*, 518 U.S. 515, 533 (1996) (holding that gender-based classifications must serve "important governmental objectives" and the discriminatory means employed must be "substantially related" to the achievement of those objectives).

Underlying these legal tests is a fundamental democratic ideal of the American republic, forged in the crucible of the Civil War: that "we are a free people whose institutions are founded upon the doctrine of equality." *Loving v. Virginia*, 388 U.S. 1, 11 (1967). The ideal of equality is embodied not only in the constitutional guarantee of equal protection of the law, which restricts the ability of the state itself to discriminate, but also in the statutes enacted by Congress outlawing discrimination in those areas of private life fundamental to equality of opportunity, such as employment and housing. These laws are the culmination of a long struggle for equality in American society. They represent a collective decision to reject a past shamefully rife with discrimination by providing its victims today with recourse to the courts to remedy it. They embody

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[27] This Court has expressly listed religion as among those inherently suspect classifications that trigger strict scrutiny. See *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (referring to "inherently suspect distinctions such as race, *religion*, or alienage") and *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (referring to an "un-justifiable standard such as race, *religion*, or other arbitrary classification") (emphases added).

our social commitment to legal equality for all and are not to be cast aside lightly by this Court.

B. **The creation and application of the ministerial exception by the courts itself violates the Equal Protection Clause.**

The Equal Protection Clause itself applies only to state actors and not private ones. See *e.g. Civil Rights Cases*, 109 U.S. 3 (1883). Although at first blush it may therefore appear that racial and gender discrimination by religious employers involves purely private conduct that does not implicate the government, and therefore the Constitution, this in fact is not the case. By inventing the ministerial exception doctrine and applying it to provide judicial protection (and therefore incentive) to private employment discrimination, courts themselves, as arms of government, violate the Equal Protection Clause.

The conclusion "that the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court." *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948), citing *Ex Parte Virginia*, 100 U.S. 339, 346 (1879) (stating that state action may "be executive, legislative, or judicial").

The sort of judicial action prohibited by the Fourteenth Amendment includes "[t]he action of state courts in . . . depriving parties of . . .

substantive rights . . . [in violation of] the due process of law." *Shelley* at 16.

As this Court explained in *Shelley*, however, violations of due process are not the only sort of judicial action that can violate the Fourteenth Amendment:

> [E]xamples of state judicial action which have been held by this Court to violate the Amendment's commands are not restricted to situations in which the judicial proceedings were found in some manner to be procedurally unfair. It has been recognized that *the action of state courts in enforcing a substantive common-law rule formulated by those courts* may result in the denial of rights guaranteed by the Fourteenth Amendment.

Id. at 17 (emphasis added).

The ministerial exception, created by judges and applied to reject discrimination claims, is just such a "substantive common-law rule" formulated and enforced by the courts. The lower federal courts have used it to slam the courthouse door in the face of plaintiffs seeking a remedy for racial and gender discrimination in employment, denying them a hearing on the merits of their claims. As in *Shelley*, this underlying discrimination itself is private, but it is the action of the court that makes its consequences real by giving the defendant the force

of law to rebuff challenges to it. A court that uses the ministerial exception to deny an otherwise available legal remedy to discrimination actively abets it, and in so doing provides the requisite state action required to find a violation of the Fourteenth Amendment. These courts act to block suits seeking redress for employment discrimination despite the fact that it is a state actor's "constitutional obligation . . . to steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination." *Norwood v. Harrison*, 413 U.S. 455, 467-68 (1973).

There is no basis to reject this conclusion simply because the ministerial exception itself does not *cause* the private discrimination to occur, instead only shielding it *post hoc* from liability. Even absent "a precise causal relationship" between state action and private discrimination, such state action violates the Equal Protection Clause if it "has a significant tendency to facilitate, reinforce, and support private discrimination." *Id.* at 466. This is true even when the state actor is not acting with discriminatory intent but instead with the object of promoting something it sees as a supposedly worthy goal, such as church autonomy. As this Court noted in *Norwood*, "[t]he Equal Protection Clause would be a sterile promise if state involvement in possible private [discriminatory] activity could be shielded altogether from constitutional scrutiny simply because its ultimate end was not discrimination but some higher goal." *Id.* at 467.

The ministerial exception enables a religious defendant to completely escape liability for illegal

racial or gender discrimination without even allowing the plaintiff a trial on the merits of his claim. Therefore the exception undoubtedly facilitates, reinforces, supports and aids such discrimination. To say this is in fact to understate the exception's effect; the exception amounts to a judicially created and enforced right to break the law with impunity. That a court in doing so claims to be protecting the free exercise of religion is no justification; as discussed above, the ministerial exception is not required by the Religion Clauses.

In applying the ministerial exception, a common-law rule created and applied by the judicial arm of the state, courts facilitate private employment discrimination on the basis of race and gender by refusing to apply federal laws making such conduct illegal. This judicial action is itself subject to the constraints of the Fourteenth Amendment. Accordingly, when the courts apply the ministerial exception, they violate the Equal Protection Clause of the Fourteenth Amendment by facilitating discrimination on the basis of race and gender.

III. IF FOUND TO BE CONSTITUTIONALLY REQUIRED, THE MINISTERIAL EXCEPTION SHOULD BE DRAWN MUCH MORE NARROWLY THAN THE DOCTRINE CREATED BY LOWER COURTS.

As this Court recognized very early in its history, it is a foundational element of our judicial system that citizens have the right to bring suit in the federal courts created by the Constitution to

protect their federal legal rights. This is because "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. 137, 166 (1803).

Congress enacted statutes such as the ADA and Title VII to overcome a long history of discrimination in private employment in the United States, and to make certain that those who still suffer such harms have legal recourse. These anti-discrimination statutes make concrete and real the promise of equality made by the Fourteenth Amendment. In enacting these statutes Congress has justly extended this promise to the private sphere of employment, by giving plaintiffs the enforceable legal right to fight back against workplace bigotry.

When courts apply the ministerial exception to deny justice to those discriminated against by an employer simply because that employer is a religious organization, they frustrate the legal process expressly created by Congress to prevent these wrongs. As this Court recognized in *Smith*, it is not the role of judges to create Free Exercise exceptions to statutes. Although Congress may do so, as it did in crafting limited exceptions in the ADA and Title VII permitting *religiously motivated* discrimination by religious employers, this does not mean that such exceptions are "constitutionally required, and that

the appropriate occasions for [their] creation can be discerned by the courts." *Smith* at 890.[28]

Furthermore, the assertion that federal courts lack subject matter jurisdiction to hear claims brought under federal anti-discrimination statutes is nonsensical.[29] The Constitution grants such jurisdiction, providing that the federal "judicial Power shall extend to *all* Cases . . . arising under . . . the Laws of the United States." U.S. Const. Art. III, §2 (emphasis added). Congress statutorily established the procedure for this "federal question" jurisdiction, giving federal district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 42 U.S.C. §1331.

Other lower courts apply the ministerial exception as a reason to grant a defendant's Rule 12(b)(6) motion, asserting that the plaintiff has failed to state a claim. This procedural approach

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[28] This court reiterated this holding in *Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005) (stating that "the political branches could shield religious exercises through *legislative* accommodation," citing *Smith* at 890) (emphasis added). Of course, even such legislative accommodations "must be measured so that it does not override other significant interests." *Id.* at 722. These interests include the Establishment Clause, which prohibits accommodations that "unyielding[ly] weigh the interests of [religion] over all other interests." *Id.* (internal quotation marks omitted).

[29] Even some courts that have adopted the ministerial exception have admitted that "it is beyond cavil that a federal district court has the authority to review claims arising under federal law." *Petruska v. Gannon University*, 462 F. 3d 294, 302 (3rd Cir. 2006).

denies the plaintiff a chance to present his or her case, cutting short the factual inquiry, in the form of discovery and trial, needed to determine whether a defendant's motivation for discrimination was religious, and therefore protected by the Free Exercise Clause, or not.

The ministerial exception should not be construed to operate in this manner; if this Court finds it necessary, it should use it to restrict the inquiries made by a court at trial, not to deny the plaintiff a trial altogether. The interests it supposedly protects can be protected in this manner without denying victims of discrimination their day in court.

This Court has previously recognized that suits brought under federal anti-discrimination statutes, such as Title VII, can be structured in such a manner as to protect important interests of the defendant without barring suit altogether. See *Webster v. Doe*, 486 U.S. 592, 604 (1988) (noting that "Title VII claims attacking the hiring and promotion policies of the [Central Intelligence] Agency are routinely entertained in federal court" and that the court "has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support [his] . . . claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission"). If an employment discrimination suit may be brought against the CIA and the factual inquiry structured in such a way as to permit discovery and trial without imperiling the most critical of competing

interests, national security, surely a court can conduct a factual inquiry into the employment practices of a church relating to a single plaintiff while balancing the need for justice and enforcement of the law against the much weaker countervailing interest of a supposed special "right" to privacy in a religious organization's internal affairs.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that the judgment of the United States Court of Appeals for the Sixth Circuit, to the extent that it concludes that the First Amendment does not bar petitioner's suit, be upheld.

Respectfully submitted,

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APPENDIX

APPENDIX

IDENTIFICATION OF *AMICI CURIAE*

The American Humanist Association ("AHA") advocates for the rights and viewpoints of humanists. Founded in 1941 and headquartered in Washington, D.C., its work is extended through more than 100 local chapters and affiliates across America. Humanism is a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity. The Mission of the American Humanist Association is to promote the spread of humanism, raise public awareness and acceptance of humanism and encourage the continued refinement of the humanist philosophy. Most recently, the American Humanist Association filed *amicus curiae* briefs with the Court in *Christian Legal Society v. Martinez*, *Salazar v. Buono*, *Pleasant Grove City v. Summum*, and *Arizona Christian School Tuition Organization, et al. v. Winn, et al.*

American Atheists, Inc. ("American Atheists"), is a volunteer organization active in protecting the rights of Atheists and promoting tolerance and understanding of the Atheist viewpoint. Founded in 1963 by Madalyn Murray O'Hair, American Atheists has been dedicated to the separation of church and state and a tireless advocate of the Atheist cause. American Atheists' perspective is rooted in the

philosophy of materialism, which holds that nothing exists but natural phenomena.

The American Ethical Union ("AEU") is a federation of Ethical Culture/Ethical Humanist Societies and circles throughout the United States. Ethical Culture is a humanistic religious and educational movement inspired by ideal that the supreme aim of human life is working to create a more humane society. AEU has participated over the years in a number of *amicus curiae* briefs in defense of religious freedom and church-state separation.

Atheist Alliance of America (the "Alliance") is an umbrella organization for independent local groups and individuals throughout the United States. Its objectives are to help democratic atheistic societies become established and work in coalition with like-minded groups, to protect the constitutional and civil rights of atheists, to inform the general public on the importance of the separation of church and state, and to work through community actions to project a positive image of atheism.

The Military Association of Atheists and Freethinkers ("MAAF") is an independent 501(c)(3) project of Social and Environmental Entrepreneurs. MAAF is a community support network that connects military members from around the world with each other and with local organizations. In addition to our community services, MAAF takes action to educate and train both the military and

civilian communities about atheism in the military and the issues that face us. Where necessary, MAAF identifies, examines and responds to insensitive practices that illegally promote religion over nonreligion within the military or unethically discriminate against minority religions or differing beliefs. MAAF supports separation of church and state and First Amendment rights for all service members.

The Secular Student Alliance ("SSA") is a network of over 250 atheist, agnostic, humanist and skeptic groups on high school and college campuses. Although it has a handful of international affiliates, the organization is based in the United States with the vast majority of its affiliates at U.S. high schools and colleges. The mission of the SSA is to organize, unite, educate and serve students and student communities that promote the ideals of scientific and critical inquiry, democracy, secularism and human-based ethics.

The Society for Humanistic Judaism ("SHJ") mobilizes people to celebrate Jewish identity and culture, consistent with Humanistic ethics and a nontheistic philosophy of life. Humanistic Jews believe each person has a responsibility for their own behavior, and for the state of the world, independent of any supernatural authority. The SHJ is concerned with protecting religious freedom for all, and especially for religious, ethnic and cultural minorities such as Jews, and most especially for Humanistic Jews, who do not espouse a traditional religious belief. The SHJ's members want to ensure

that they, as well as people of all faiths and viewpoints, will not be discriminated against by government favoring of any one religion over another or theistic religion over humanistic religion.

AMICUS CURIAE BRIEF

No. 10-553

IN THE

Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE AMERICAN JEWISH COMMITTEE AND THE UNION FOR REFORM JUDAISM AS AMICI CURIAE IN SUPPORT OF PETITIONER

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The undersigned *amici curiae* respectfully submit this brief in support of Petitioner Hosanna-Tabor Evangelical Lutheran Church and School ("Hosanna-Tabor").[1]

INTEREST OF THE *AMICI CURIAE*

The American Jewish Committee ("AJC"), a national organization of over 125,000 members and supporters and 26 regional offices, was founded in 1906 to protect the civil and religious rights of Jews. AJC believes that the most effective way to achieve that goal is to safeguard the civil and religious rights of all Americans. AJC has a long tradition of defending Americans' religious liberty, and believes that maintaining church-state separation through limiting government entanglement with religion is the surest guarantor of that liberty. With these paramount First Amendment rights in mind, AJC urges the Court to find that the Sixth Circuit erred when it applied an overly-rigid, quantitative test to determine that Respondent Cheryl Perich ("Perich") was not a minister for purposes of the judicially-created "ministerial exception" to employment discrimination laws. The ministerial exception safeguards the right of religious institutions to select clergy free from government interference. And whether grounded in the First Amendment's Free Exercise Clause, the Establishment Clause, or both, the ministerial exception is a necessary adjunct to the

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici, or its counsel, made a monetary contribution intended to fund its preparation or submission. The parties have filed blanket waivers with the Court consenting to the submission of all amicus briefs.

guarantee of religious liberty. A court's determination that an employee of a religious institution is not a member of its clergy based on arbitrary factors such as the comparative quantity of time spent on activities the court deems "religious" severely curtails that freedom. The Court should make clear that the Sixth Circuit was wrong in its benchmark for determining whether a claimant is a ministerial employee.

The Union for Reform Judaism ("Union") is the congregational arm of the Reform Movement of Judaism in North America including 900 congregations encompassing 1.5 million Reform Jews. The Union comes to this issue out of its longstanding commitment to the principle of separation of church and state, believing that the First Amendment to the Constitution is the bulwark of religious freedom and interfaith amity. The concept of separation of church and state has lifted up American Jewry, as well as other religious minorities, providing more protections, rights and opportunities than have been known anywhere else throughout history. The Union believes deeply that the ability of houses of worship to make employment decisions are a vital manifestation of First Amendment principles. At the same time, the Union remains committed to civil rights laws that ensure essential protections to individuals who have been and continue to be victims of discrimination. Such civil rights laws reflect core American values of equality, liberty and due process. The petitioner and respondents each raise vital religious liberty and civil rights concerns. As an entity committed to both religious liberty and civil rights, the Union has a vested interest in ensuring that the standard for applying the ministerial exception to employment discrimination laws reflects an appropriate balance between these two important, long recognized interests.

SUMMARY OF ARGUMENT

All courts and parties considering the matter have uniformly recognized a ministerial exception to employment discrimination laws as a necessary means of protecting religious institutions' right to select and appoint clergy. When the employee in question is not clearly "ministerial," trial and appellate courts have determined whether the exception encompasses that employee by analyzing whether the employee's "primary" job function is religious.

Here, the Sixth Circuit erred in the standard it applied to evaluate whether Respondent Cheryl Perich's position as a teacher in a Lutheran school was "ministerial." It applied a simplistic, quantitative test – counting minutes per day spent on various job activities – and concluded that Ms. Perich was not ministerial because the quantitative majority of her work time was spent on duties the Sixth Circuit cursorily determined were *not* religious.

This Court should make clear that the proper approach for determining who is "ministerial" for purposes of the ministerial exception must be holistic, objectively examining the nature of the position and the particular employee's function within the religious organization. Such an approach would ascertain – through verifiable factors – whether furtherance of a religious entity's religious or spiritual mission is integral to an employee's position, and whether religious duties represent a *qualitatively* significant function of the employee's job. If so, that employee should be considered ministerial for purposes of the exception.

One specific issue, not presented on this record, and which the Court should reserve for another day, is whether some employment-related claims such as retaliation claims – as distinct from claims of substantive employment discrimination – may be brought by any, some or all employees deemed ministerial for purposes of the ministerial exception.

Finally, because a determination of whether the ministerial exception bars a plaintiff's claims involves an assessment of the nature of the claim and whether plaintiff's ministerial status prevents her from asserting it, this Court should clarify that the ministerial exception is not jurisdictional, and that a dismissal based on the exception should be predicated upon Federal Rule of Civil Procedure 12(b)(6), not Rule 12(b)(1).

ARGUMENT

I. THE COURT SHOULD ADOPT A FUNCTIONAL, OBJECTIVE APPROACH TO DETERMINING WHO IS A "MINISTERIAL" EMPLOYEE FOR PURPOSES OF THE MINISTERIAL EXCEPTION.

The ministerial exception to the application of employment discrimination laws to religious entity employers prevents "an encroachment by the State into an area of religious freedom which it is forbidden to enter": a church's freedom to select and set standards for its own religious leaders. *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972). The exception also limits the unconstitutional entanglement between church and

state that may otherwise result when a court adjudicates employment-related claims asserted against a church by its clergy. *See Petruska v. Gannon Univ.*, 462 F.3d 294, 303 (3d Cir. 2006), *cert. denied*, 550 U.S. 903 (2007). This doctrine of ecclesiastical abstention is thus firmly rooted in both the Free Exercise and Establishment Clauses of the First Amendment. *See Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952) ("Freedom to select the clergy . . . must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference"); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 7-8 (1929) ("Because the appointment [to a collative chaplaincy] is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them. . . . the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive"); *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) ("[t]he objective [of the Establishment Clause] is to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other"); *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979) ("The church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school. We see no escape from conflicts flowing from the . . . exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow"). Every Federal Court of Appeals (except for the Federal Circuit, which has not had occasion to consider it) has recognized and adopted the ministerial exception in some form as a

constitutional necessity.[2] No party to this litigation has challenged the existence of the exception.

But the Circuits have struggled to determine which employees of religious institutions other than traditional religious leaders employed by a house of worship or place of religious instruction – *i.e.* ordained priests, pastors, rabbis, imams – are "ministerial employees" subject to the ministerial exception. These struggles generally have involved application of variously articulated versions of a so-called "primary duties" test, which – broadly – attempts to assess whether the employee's primary employment duties are religious. *See Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1291 (9th Cir. 2010) (listing circuit courts applying the "primary duties" test, or tests like it, but emphasizing that "[f]or our part, we have declined to adopt any particular test"). If the balance tips in favor of religious activity, courts generally apply the exception to bar the employee's claim.

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2. *See, e.g., Natal v. Christian & Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989); *Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008); *Petruska*, 462 F.3d 294 (3d Cir.); *EEOC v. Roman Catholic Diocese*, 213 F.3d 795 (4th Cir. 2000); *McClure*, 460 F.2d 553 (5th Cir.); *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769 (6th Cir. 2010); *Tomic v. Catholic Diocese*, 442 F.3d 1036 (7th Cir. 2006), *cert. denied*, 549 U.S. 881 (2006); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360 (8th Cir. 1991); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004); *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648 (10th Cir. 2002); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299 (11th Cir. 2000); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996).

Defining "primary" is a salient part of the struggle to apply the test; the label itself is somewhat inappropriate. Here, the Sixth Circuit's quantitative analysis of Ms. Perich's duties as a fourth grade teacher in a Lutheran church-affiliated school was a misguided implementation of the test; it relied on an overly literal definition of "primary." But in this context, "primary" should be understood to mean "significant" or "essential," not "predominant" or "first." The proper test should recognize that quantity is relevant, but not dispositive. And the District Court's excessive reliance on the school's subjective labeling of Perich as a "minister" was misguided as well. The key issue is whether religion or religious inculcation or practice is integral to the employee's job based on an analysis of objective criteria, in which event the employee should be deemed "ministerial" for purposes of the exception.

A. Courts Should Determine Who is a Ministerial Employee Using an Objective Assessment of the Employee's Role Within the Religious Entity.

If furtherance of a religious entity's religious or spiritual mission is integral to an employee's position within a religious institution and is a qualitatively significant function of the employee's position, that employee should be considered ministerial for purposes of the ministerial exception. The determination that furtherance of religion is integral to an employee's job should be based on an objective assessment of the employee's duties, the nature of his or her position, and whether religious duties are in fact an essential component of the employee's job. An objective assessment could consider externally verifiable factors such as: job descriptions or mission statements

published by the religious entity; tasks and duties regularly performed by the employee; whether qualification for the position includes particular religious training or courses of study; and whether the employee acts as an intermediary between the faith and its followers, or between the faith and the general populace within the religious entity's known hierarchical structure.

The Fourth Circuit in *Rayburn v. General Conference of Seventh-Day Adventists* first advanced Professor Bruce Bagni's most-often quoted articulation of the so-called "primary duties" test for examining whether the "function of the position" of an employee can be characterized as ministerial: "'As a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered "clergy."'" 772 F.2d 1164, 1168-69 (4th Cir. 1985) (quoting Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 Columbia L. Rev. 1514, 1545 (1979)). The plaintiff in *Rayburn* alleged that she had been refused employment as an "associate in pastoral care" at a particular Seventh-day Adventist church on account of her sex and race, constituting discrimination prohibited by Title VII of the Civil Rights Act of 1964 ("Title VII"). 772 F.2d at 1165. Because the position for which Rayburn applied "so embodie[d] the basic purpose of the religious institution," the Fourth Circuit concluded that the position was ministerial, even though Rayburn could never have become an ordained minister in the Seventh-day Adventist Church (the Church did not ordain women). *Id.* at 1168. In concluding that an "associate in pastoral care" position

within the Seventh-day Adventist Church was ministerial, the Fourth Circuit relied on objective evidence and applied the "primary duties" test articulated above. It considered the associate in pastoral care job description, the fact that lay members of the congregation sometimes served in similar capacities as associates in pastoral care, and the fact that the position did not require (indeed could not require, if filled by a woman) ministerial ordination. *See id.* at 1165, 1168. Weighing these objective criteria, the Fourth Circuit concluded that "[t]he role of an associate in pastoral care is so significant in the expression and realization of Seventh-day Adventist beliefs that state intervention in the appointment process would excessively inhibit religious liberty." *Id.* at 1168.

Rayburn was an "easy" case; the job description of associate in pastoral care focused on religious activities and included no secular aspects. *See id.* at 1165 (the "position entailed teaching baptismal and Bible classes, pastoring the singles group, occasional preaching at Sligo and other churches, and other evangelical, liturgical, and counselling [sic] responsibilities," as well as the possibility of receiving a "'commissioned minister credential'"). But the *Rayburn* model can be and has been appropriately applied to determine that a position with significant secular aspects is nevertheless functionally ministerial from an objective perspective. *Rayburn* thus serves as a baseline for the proper application of an objective, role-based approach to determining who is "clergy" for purposes of the ministerial exception.

Two recent decisions from the highest courts of Wisconsin and the District of Columbia employed this role-based, functional approach to analyze whether a

teacher at a Catholic elementary school in Wisconsin and a principal at a Catholic elementary school in the District of Columbia – positions involving significant secular components – were "ministerial" under the ministerial exception. *See Coulee Catholic Schs. v. Labor & Indus. Review Comm'n*, 768 N.W.2d 868 (Wis. 2009); *Pardue v. Ctr. City Consortium Sch. of the Archdiocese of Wash.*, 875 A.2d 669 (D.C. 2005). In *Coulee*, the Supreme Court of Wisconsin found that a first grade teacher at a Catholic elementary school was ministerial because she "was not simply a public school teacher with an added obligation to teach religion. She was an important instrument in a faith-based organization's efforts to pass on its faith to the next generation." *Coulee*, 768 N.W.2d at 890. The plaintiff's "position as a first-grade teacher was important and closely linked to the religiously-infused mission of the school. . . . [She] was required to perform quintessentially religious tasks as a central part of her job, and her role was an essential part of the Catholic Church's educational ministry to its youth." *Id.*

In finding that the plaintiff's "role was of high importance and closely linked to the mission of the school," the Wisconsin Supreme Court considered such objective and externally verifiable factors as (1) the "nature and mission" of the employer-school (by reference to testimony regarding the Catholic school's role within the general Catholic church, a faculty handbook that included a statement of the school's and church's religious mission, expectations stated in plaintiff's employment contract, and religious curricular components); (2) plaintiff's formal job description; (3) plaintiff's daily activities within her school day – which included leading students in prayer, attending mass with her students, and instructing her students in

a thirty minute religion class four days per week; and (4) the presence of religious objects in her classroom. The *Coulee* decision recognized that the quantitative majority of the teacher's workday consisted of secular activities such as preparing for class and instructing the students in secular subjects or supervising them during recess. *See id.* at 872-875. But this "functional," "holistic" approach encompassed – as its "primary concern" – the "function of the employee, not only the enumerated tasks themselves." *Id.* at 882.

The *Coulee* court emphasized the objective nature of its "functional" approach to determining whether a position is "closely linked" to the "fundamental mission" of the religious employer:

> Relevant evidence as to the employee's importance to the religious mission of the organization will include objective employment indicators such as hiring criteria, the job application, the employment contract, actual job duties, performance evaluations, and the understanding or characterization of a position by the organization. Teaching, evangelizing, church governance, supervision of a religious order, and overseeing, leading, or participating in religious rituals, worship, and/or worship services will serve as important factors, rather than the only evidence we measure or consider as under the quantitative approach. These quintessentially religious tasks will evince a close link and importance to an organization's religious mission.

Id. at 883. Because courts' consideration of religious-entity employees with both secular and religious job components will necessarily be fact-specific, the proper test of whether a particular employee is ministerial must rely – as much as possible – on objective and externally verifiable factors such as these.

The District of Columbia Court of Appeals employed a similar functional approach in determining that the principal of a Catholic elementary school was a ministerial employee. *See Pardue*, 875 A.2d at 675 ("'Our inquiry . . . focuses on "the function of the position" at issue and not on categorical notions of who is or is not a "minister"'") (quoting *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 801 (4th Cir. 2000)). In applying a functional, holistic "primary duties" test, the *Pardue* court relied on externally verifiable objective factors such as general statements of "The Mission of Catholic Schools in the Church of Washington" and the "Catholic Schools Office Mission Statement," a list of "Major Areas of Responsibility" for the principal, performance evaluations, the employment contract signed by the plaintiff, plaintiff's recounting of her own hiring process for teachers and her duty to work with the pastor in matters of administration, religious education and school policy. 875 A.2d at 676. The *Pardue* court acknowledged that a quantitatively large portion of the plaintiff's daily duties were "secular in appearance – designed to meet public licensing requirements and to maintain the standing of the institution." *Id.* at 677. But the court also emphasized that, based on an evaluation of the principal's position as a whole within the Catholic school as well as externally verifiable articulations of the D.C. Catholic schools' religious purpose, "these many responsibilities

– some predominantly 'secular' and some predominantly religious – are inextricably intertwined in the school's mission and in the principal's role in fulfilling it." *Id.*

Recent decisions in the Fourth, Fifth and Seventh Circuits have taken a similarly functional, holistic – though less specifically articulated – approach to determining whether religion is qualitatively significant to an employee's role within the religious institution that employs him or her. *See EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 802-03 (4th Cir. 2000) (recognizing that a "fact-specific examination of the function of the position" is required; finding – after consideration of job descriptions, job duties performed, and the objective centrality of the role of music in the Catholic faith – that position of Director of Music Ministry in Catholic Church and part-time music teacher in Catholic School were ministerial); *Clapper v. Chesapeake Conference of Seventh–day Adventists*, No. 97-2648, 166 F.3d 1208, 1998 WL 904528, at *1, *6-7 (4th Cir. Dec. 29, 1998) (unpublished) (classifying teacher in Seventh-day Adventist elementary school as ministerial after considering the Seventh-day Adventist Education Code, the employment contract, generally accepted principals of Seventh-day Adventism, plaintiff's teaching duties, the fact that plaintiff's salary was partially funded by Church tithes, and "the degree of the church entity's reliance upon such employee to indoctrinate persons in its theology," even though majority of teacher's daily teaching time was spent on secular subjects); *Starkman v. Evans*, 198 F.3d 173, 175-77 (5th Cir. 1999) (choirmaster and director of music in Methodist Church was ministerial based on multi-factor test considering plaintiff's employment duties, job requirements, qualifications and authorizations to perform

Church ceremonies and "actual role" at the church, as well as whether employment decisions regarding plaintiff's job were generally made based on religious criteria); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1041 (7th Cir. 2006) (music director and organist of Catholic Church was ministerial because – based on consideration of his job description, job duties, and the role of music within the Catholic tradition – his duties "had a significant religious dimension"); *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 703-04 (7th Cir. 2003) ("In determining whether an employee is considered a minister for the purposes of applying this exception, we do not look to ordination but instead to the function of the position;" finding that Hispanic Communications Manager for Catholic Church was ministerial based on consideration of plaintiff's duties and the fact that plaintiff "was integral in shaping the message that the Church presented to the Hispanic community"). A common thread among these decisions is their consideration of a broad variety of externally verifiable, largely objective factors; no one factor is dispositive of whether the employee is ministerial, and in each case significant secular duties were involved in the position.

B. The Court Should Reject the Sixth Circuit's Quantitative Approach to Determining Who is a Ministerial Employee.

Here, the Sixth Circuit paid lip service to the proper test for determining whether Perich's position was ministerial when it stated that "[t]he governing primary duties analysis requires a court to objectively examine an employee's actual job function." *Hosanna-Tabor*, 597 F.3d at 781. But the Sixth Circuit, in ultimately determining

that Perich was not a ministerial employee of Hosanna-Tabor, did *not*, in fact, objectively examine Perich's actual job function. Rather, the Court of Appeals based its determination almost exclusively on the fact that "Perich spent approximately six hours and fifteen minutes of her seven hour day teaching secular subjects" and that she only "participated in and led *some* religious activities throughout the day." *Id.* at 780 (emphasis added).[3]

The Court should reject the Sixth Circuit's quantitative approach to determining whether an employee is ministerial. As this Court has consistently recognized, determining what is "'religious'" is "a difficult and delicate task." *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1981). Surely it is more delicate than a matter of counting hours or minutes.

Indeed, "[w]hat makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 343 (1987). That a particular teacher may spend

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3. The Sixth Circuit also appears to have added in a requirement that, for Perich to be considered ministerial, the Lutheran church "rel[y] on Perich as *the primary* means to indoctrinate its faithful into its theology." *Hosanna-Tabor*, 597 F.3d at 781 (emphasis added). *Amici curiae* are aware of no other court that has required a religious employee to be the "*the* primary" means of a religious entity's indoctrination of its faithful to be eligible for the ministerial exception. *Clapper*, which the Sixth Circuit cites in support of the proposition, does not endorse such a requirement. *See Clapper*, 1998 WL 904528, at *7. The Court should reject this "*the* primary means" requirement, along with the Sixth Circuit's generally quantitative approach.

thirty percent, or fifty-one percent of her work day on overtly religious activities cannot, in isolation, determine the overall religious character of her employment. A test under which arbitrary percentages alone determine if an employee is ministerial undercuts the very foundation on which the exception rests – that it is for a religious organization to determine its means and methods of inculcation and religious practice. For some schools, it may very well be that the forty-five minutes per day that a teacher devotes to religious instruction infuses the rest of the school day – and the rest of that teachers' duties – with a palpable religious character.

Without doubt, the quantity of time an employee spends on religious activity is relevant to the determination of whether furtherance of a religious entity's religious or spiritual mission is a qualitatively significant function of an employee's position. And as noted, determining what is a "religious" activity is not always obvious or easy. In that regard, an appropriately holistic inquiry recognizes that secular-sounding job activities may actually be religious in nature, though perhaps to a lesser degree than overtly religious-sounding job activities. *See, e.g., Pardue*, 875 A.2d at 677 ("merely enumerating the duties in Pardue's job description, many under secular-sounding headings such as 'materials management' and 'office management,' tells us little about whether her 'position is important to the spiritual and pastoral mission of the church'") (quoting *Rayburn*, 772 F.2d at 1169).

As The Wisconsin Supreme Court appropriately recognized, "the quantitative approach means as a practical matter . . . that the state can interfere with the hiring and firing of the leaders of religious organizations

and houses of worship so long as the leaders are spending (presumably) 49 percent or less of their time or tasks on whatever the court determines to be 'religious' activities." *Coulee*, 768 N.W.2d at 882. Such a test does not appropriately vindicate the principles that underlie the ministerial exception. And such a test is a classic illustration of the relentless preference for secular over religious that Justices Goldberg and Harlan warned against in their concurrence in *School Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 306 (1963): "[U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it."

By contrast, a role-based, functional approach to determining who is ministerial – particularly in the parochial school context – furthers both the Free Exercise and Establishment Clause underpinnings of the ministerial exception. This approach leaves religious schools free to structure their day as they see fit, and to integrate religious and secular teachings into one curriculum taught by one teacher so that the school may convey to its young faithful – in visible ways – its commitment to the compatibility of secular and sacred pursuits. A quantitative approach forces parochial schools to artificially divide the secular from the religious – which may impede a school's spiritual mission – to protect its freedom to select its own ministers.

It is not the business of the state to tell parochial schools whether or to what extent they may integrate secular and sacred studies; the state surely could not mandate such a separation directly. The state should not be permitted to enforce this separation indirectly by acknowledging the ministerial status of only those teachers who limit themselves exclusively or predominantly to religious instruction. Courts should not strip these dual-role teachers of their ministerial status based on a quantitative analysis alone any more than they could deny the ministerial status of a church's pastor, synagogue's rabbi or mosque's imam who offered secular as well as religious counseling.

C. The Court Should Reject Overly Subjective Approaches to Determining Who is a Ministerial Employee.

Objectively verifiable factors such as whether the employee in question has been given a ministerial title by the religious institution are a proper part of the inquiry into whether a particular employee is ministerial. Indeed, courts ought to give substantial deference to a church's designation, where – as here – the church's designation of "minister" was pursuant to a long-standing and externally verifiable church policy, clearly not created for the purpose of avoiding its obligations under Title VII or the Americans with Disabilities Act ("ADA"). *See Watson v. Jones*, 80 U.S. 679, 729 (1871) ("It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so").

But titles and other similarly subjective criteria alone cannot be dispositive. *See Dickinson v. United States*, 346 U.S. 389 (1953) (in selective service context, "[c]ertainly all members of a religious organization or sect are not entitled to the [statutory ministerial] exemption [to selective service] by reason of their membership, even though in their belief each is a minister").

Here, the District Court – like the Sixth Circuit on appeal – recited the elements of the proper ministerial inquiry, that "an employee may be considered ministerial, although not ordained, depending on the function and actual role of his or her position in the religious institution." *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*, 582 F. Supp. 2d 881, 887 (E.D. Mich. 2008). But the District Court's decision then appeared to rest primarily on the fact that "Hosanna-Tabor considered Perich a 'commissioned minister.'" *Id.* at 892. Instead of considering Perich's title as one factor within the larger inquiry into Perich's status, the District Court concluded that since "there is no indication that Hosanna-Tabor uses the title 'commissioned minister' as subterfuge to avoid employment litigation," it could give almost complete deference to Hosanna-Tabor's use of the title to qualify Perich for the ministerial exception. *Id.* at 891.

The District Court's approach was far too narrowly focused. "While religious organizations may designate persons as ministers for their religious purposes free from any governmental interference, bestowal of such a designation does not control their extra-religious legal status." *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 283 (5th Cir. 1981). This Court's Free Exercise jurisprudence – whether pre-or-post

Employment Division Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) – has always sought to strike a balance between legitimate state interests and unfettered religious liberty. A ministerial exception analysis that gives total deference to a religious entity's definition of minister would unjustifiably upset that balance.

* * *

We leave it to the parties to argue whether Ms. Perich should be deemed ministerial on the facts presented. However, even on the facts as marshaled by the Sixth Circuit, a court very likely could find – under the proper test – that Ms. Perich's role was objectively ministerial, similar to that of the teacher in *Coulee*. Indeed – while the inquiry in this case must be specific to its facts, this Court has several times "recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school." *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979). The Court should reverse the Sixth Circuit and instruct it to remand to the District Court with direction to determine whether an objective, holistic assessment of Ms. Perich's role and function as a fourth grade teacher at Hosanna-Tabor requires the conclusion that she was a ministerial employee.

II. A DETERMINATION THAT AN EMPLOYEE IS MINISTERIAL MAY NOT NECESSARILY BAR RETALIATION CLAIMS.

Because the Sixth Circuit found that Perich was not a ministerial employee, it had no occasion to consider whether – if she qualified as ministerial – her retaliation

claims might nevertheless have gone forward.[4] *See, e.g.*, *Rweyemamu*, 520 F.3d at 208 (Second Circuit examines both a plaintiff's status as a ministerial employee *and* the nature of plaintiff's claim before deciding whether the claim is barred by the ministerial exception). In this case's current posture, the issue of whether the ministerial exception creates absolute and complete immunity from anti-discrimination lawsuits by ministerial employees against their religious entity employers – particularly in relation to retaliation claims – is not before the Court. This issue raises difficult questions, which ought not to be resolved in this case, on this record, and the Court should reserve the question.[5]

Courts confirming the ministerial exception have not considered whether retaliation claims – as distinct from claims of substantive discrimination – may be brought by employees deemed ministerial for purposes of the ministerial exception.[6] Allowing retaliation claims despite

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4. Only retaliation under the Americans with Disabilities Act and the corresponding Michigan state law were at issue. Perich and the EEOC brought no claims of substantive discrimination. *See Hosanna-Tabor*, 582 F. Supp. 2d at 883.

5. It is also not clear whether this issue was preserved by the Respondents, and whether the district court may even reach it on remand.

6. A New York district court briefly addressed retaliation as a non-barred claim in a recent ministerial exception case, and concluded that because the defendant Diocese "does not claim that Plaintiff's [alleged retaliatory] termination had anything to do with religious doctrine or the inner workings of the Catholic Church," consideration of the retaliation claim would not "result in any entanglement with religious doctrine." *Rojas v. Roman Catholic Diocese of Rochester*, No. 07-cv-6250, 2010 WL 3945000,

a claimant's ministerial status would serve the important function of minimizing the chilling effect that an absolute ministerial exception would have on arguably ministerial employees – or even clearly non-ministerial employees – from asserting their statutory rights to report or complain of discrimination both to their employers and to outside enforcement agencies.[7] It is also not necessarily clear that retaliation claims implicate religious doctrine or the right of a church to choose its own clergy in the way that claims of substantive discrimination do. Even for employees who are "ministerial," adjudication of a retaliation claim may be more comparable to the permissible application of a neutral, generally applicable and incidentally burdensome

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at *22 (W.D.N.Y. Oct. 6, 2010). *Rojas* did not address the usual freedom to select clergy justification for the ministerial exception in that context.

7. Providing a forum for retaliation claims in situations where the ministerial exception bars claims of substantive discrimination would thus be consistent with the distinction this Court recently made between Title VII discrimination and retaliation claims. This Court explained that, while the employment-related language of the substantive discrimination provisions of Title VII, 42 U.S.C. § 2000e-2 "limit[s] the scope of that provision to actions that affect employment or alter the conditions of the workplace," with regard to the anti-retaliation provision, "[n]o such limiting words appear." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62 (2006). This difference, the Court explained, stems from the differing purposes of the two provisions. While "[t]he antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status," the "antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." *Id.* at 63.

law to a religious organization. *See, e.g. Jimmy Swaggart Ministries v. Bd. of Equalization of California*, 493 U.S. 378, 380 (1990).

Nevertheless, whether to allow retaliation claims by at least some employees whose substantive discrimination claims are barred by the ministerial exception is an issue not framed in the question presented, and not addressed by the trial court or the Sixth Circuit. While there are arguments in favor of allowing retaliation claims in some circumstances, such a carve out or limitation to the ministerial exception could create an unintended loophole for backdoor litigation of substantive discrimination claims. It may well be that it is impossible for courts to adjudicate retaliation claims by ministerial employees without opening the door to the underlying claims of substantive discrimination. Or it may be possible in some cases and not in others. *Amici* take no position now on how these issues ought to be resolved where presented. Such issues should be reserved for further consideration on a more appropriately articulated record.

III. THE MINISTERIAL EXCEPTION IS NOT JURISDICTIONAL.

The District Court dismissed Respondents' claims under Federal Rule of Civil Procedure 12(b)(1), for lack of subject matter jurisdiction, without explaining its basis for doing so. *See Hosanna-Tabor*, 582 F. Supp. 2d at 887. The Sixth Circuit noted that the District Court had invoked Rule 12(b)(1), and that other circuits had taken different approaches, but failed to analyze *why* the ministerial exception was "jurisdictional in nature." 597 F.3d at 775. But a determination as to whether a claim is barred by

the ministerial exception is not a jurisdictional matter. That determination does not implicate a federal court's authority to adjudicate employment discrimination claims or constitutional defenses to those claims. Rather, "the exception . . . is best viewed as a challenge to the sufficiency of [a claimant's] claim. . . . the question does not concern the court's power to hear the case – it is beyond cavil that a federal district court has the authority to review claims arising under federal law – but rather whether the First Amendment bars [her] claims." *Petruska*, 462 F.3d at 302. Recognition that assertion of the ministerial exception is appropriately considered as part of an assessment of the sufficiency of a plaintiff's claims, in contrast with the Sixth Circuit's unexplained 12(b)(1) analysis here, heeds this Court's admonition – referring to unexplained 12(b)(1) rulings in other contexts – that "[w]e have described such unrefined dispositions as 'drive-by jurisdictional rulings' that should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (quoting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 91 (1998)).

Just as Title VII's numerical threshold (at issue in *Arbaugh*) was not a jurisdictional threshold for plaintiff's claims, but rather "relate[d] to the substantive adequacy of Arbaugh's Title VII claim," *Arbaugh*, 546 U.S. at 504, there is no "ministerial" jurisdictional threshold in the Americans with Disabilities Act or the Michigan Persons with Disabilities Civil Rights Act, the statutes under which Perich claims. Rather, if Perich is a ministerial employee and her retaliation claim would impermissibly encroach on Hosanna-Tabor's First Amendment rights, then she has failed to state a claim, and her complaint should be

dismissed on that basis. That determination does not implicate a federal court's subject matter jurisdiction to adjudicate such claims. *See Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) ("Subject-matter jurisdiction . . . refers to a tribunal's power to hear a case. . . . It presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief") (internal quotation marks and citations omitted).

CONCLUSION

The decision of the United States Court of Appeals for the Sixth Circuit should be reversed and remanded to the District Court with instructions to assess whether Perich is a ministerial employee under the proper test, and whether Perich nevertheless can state and has stated a claim for retaliation.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE
Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

Brief of Americans United for Separation of Church and State, American Civil Liberties Union, ACLU of Michigan, National Council of Jewish Women, Sikh Council on Religion and Education, and Unitarian Universalist Association as *Amici Curiae* In Support of Respondents

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Interest of *Amici Curiae*

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization based in Washington, D.C.[1] Its mission is twofold: (1) to protect the right of individuals and religious communities to worship as they see fit, and (2) to preserve the separation of church and state as a vital component of democratic government. Americans United has more than 120,000 members and supporters across the country. Since its founding in 1947, Americans United has participated as a party, counsel, or *amicus curiae* in numerous church-state cases, including many cases before this Court.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU of Michigan is a statewide affiliate of the national ACLU. Since its founding in 1920, the ACLU has appeared before this Court on numerous occasions, both representing parties and as *amicus curiae*. As an organization that has long been committed to both preserving First Amendment rights and opposing discrimination, the ACLU has a strong interest in the proper resolution of this case.

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[1] Each party has filed a letter with the Clerk of the Court consenting to the filing of amicus briefs. Pursuant to Rule 37.6, neither a party nor its counsel authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

The National Council of Jewish Women (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Principles state that "Religious liberty and the separation of religion and state are constitutional principles which must be protected and preserved in order to maintain our democratic society." Further, NCJW's Resolutions state that "discrimination on the basis of race, gender, national origin, ethnicity, religion, age, disability, marital status, sexual orientation or gender identity must be eliminated."

The Sikh Council on Religion and Education is a faith-based, non-profit organization dedicated to creating awareness of the Sikh religion and the Sikh people in the United States and around the globe and to promoting the values of justice, equality, and brotherhood imbibed in the Sikh religion. It also aims to provide a platform for interfaith dialogue to create a peaceful coexistence of all faiths.

The Unitarian Universalist Association is a religious organization of more than 1,000 congregations in the United States and North America. Through its democratic process, the Association adopts resolutions consistent with its fundamental principles and purposes. The Association has adopted numerous resolutions affirming the principles of separation of church and state and personal religious freedom.

Amici support the use of reasonable accommodations to ease burdens on the practice of religion. Several of the joining *amici* have filed briefs with this Court supporting those seeking religious exemptions in cases such as *Cutter* v. *Wilkinson*, 544 U.S. 709 (2005), and *amici* recognize that an appropriately tailored ministerial exception preserves the independence of America's religious communities. As they are with other exemptions, however, *amici* are concerned that the ministerial exemption not be applied more broadly than necessary to protect religious freedom. When used to justify discrimination unconnected to a religious institution's religious beliefs, the ministerial exception undermines anti-discrimination law without a corresponding benefit to religious liberty.

Summary of Argument

The ministerial exception is designed to allow religious bodies to practice their religion and convey their message without government interference. But the exception thwarts society's interest in ending discrimination—without serving the exception's purpose—when applied to shield a religious entity from liability for discrimination or retaliation that is unrelated to religious ideology. As a result, in applying the ministerial exception, courts can and should use their considerable experience in determining whether sincere religious views animated a litigant's conduct. And the Constitution provides no bar to this enterprise.

First, although the ministerial exception serves important religious-liberty interests, it should be applied no more broadly than necessary to address

the constitutional concerns that underlie it. These concerns call for the exception to apply only when the adverse employment action at issue was religiously motivated. Moreover, application of the ministerial exception to immunize employment-related conduct unrelated to religion—merely because the affected employee's duties were primarily religious—would undermine the enforcement of important nondiscrimination laws. The creation of such a regime falls to Congress, not the courts.

Second, just as the ministerial exception should not protect religious entities from liability for conduct that is unrelated to an institution's religious beliefs, the exception should not prevent courts from assessing whether the employer's asserted religious motivation for that conduct was pretextual. Such an inquiry would not, as Petitioner suggests and some lower courts have held, entangle courts in disputes about church doctrine. The pretext inquiry is familiar to American courts, and in most cases requires no analysis of religious doctrine. If and when a pretext inquiry does require improper consideration of religious doctrine, the courts must abstain. That mere possibility, however, does not justify blanket abstention even from cases in which pretext can be divined without entanglement.

Thus, even if the Court were to conclude that Ms. Perich was a ministerial employee, the ministerial exception should protect Petitioner only if the challenged employment decision arose from religious concerns—rather than from secular animus or retaliation. Here, the record contains ample evidence that Ms. Perich's termination was motivated by factors unrelated to Petitioner's religious beliefs, doc-

trine, or mission. *See* Perich Br. 7–15, 34–35; U.S. Br. 5–8. Her lawsuit should proceed.

Argument

I. The Ministerial Exception Does Not Entitle Religious Entities To Discriminate Or Retaliate For Reasons Unrelated To Religion.

The constitutional interests underlying the creation of the ministerial exception center on important religious-liberty concerns: The state cannot force a church to hire or retain key personnel who are unable to perform the church's religious functions in accordance with the church's religious beliefs, teachings, and mission. Likewise, to the extent that disputes arise about whether such an employee's beliefs or conduct comports with church doctrine, the courts should not interfere with the church by resolving ecclesiastical disputes. This deference to religious bodies over matters of doctrine is crucial to ecclesiastical independence and thus to religious liberty.

At the same time, the exception interferes with the application of congressionally enacted statutes that promote a compelling national interest in preventing discrimination on the basis of protected classifications including race, gender, and national origin. As a result, the exception should be no broader than necessary to vindicate its underlying constitutional interests. Those interests—ensuring the free exercise of religion, and preventing courts from entangling themselves with or interpreting religious doctrine—can be satisfied by applying the ministerial exception only when the otherwise illeg-

al acts are motivated by religious concerns. Yet as Petitioner acknowledges, most Courts of Appeals have applied the ministerial exception more broadly—to immunize defendants from suit even when these defendants did not assert that their conduct arose from religious belief. *See, e.g.*, *Rayburn* v. *Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985) (holding that ministerial exception "protects the act of a decision rather than a motivation behind it").

In so doing, these courts have extended the exception far beyond what is required by the Religion Clauses. They have converted the ministerial exception into a shield for all forms of discrimination and retaliation, regardless of motivation. And they have prevented judicial redress of even the most flagrant racial or sexual harassment, even when motivated by naked animus unrelated to any religious belief.

A. As Petitioner recognizes, the ministerial exception is rooted in concerns about religious liberty. *See* Pet'r Br. 13–14. Religious entities must have the right to hire ministerial employees whose beliefs and conduct are consistent with those entities' beliefs and practices. *See Rweyemamu* v. *Cote*, 520 F.3d 198, 205 (2d Cir. 2008) ("it would surely be unconstitutional under the First Amendment to order the Catholic Church to reinstate, for example, a priest whose employment the Church had terminated on account of his excommunication based on a violation of core Catholic doctrine"). They must be able to control their religious message. *See Natal* v. *Christian & Missionary Alliance*, 878 F.2d 1575, 1578 (1st Cir. 1989) ("a religious organization's fate is inextricably bound up with those whom it en-

trusts with the responsibilities of preaching its word and ministering to its adherents"). And they must avoid judicial second-guessing of their scriptural interpretations. *See Presbyterian Church in U.S.* v. *Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440, 451 (1969) (courts must avoid "interpreting or weighing church doctrine"). These concerns—and the ministerial exception itself—"derive[] from both the Free Exercise and Establishment Clauses of the First Amendment." *Alcazar* v. *Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1291 (9th Cir. 2010).

Because it serves specific constitutional interests, however, the ministerial exception does not apply to all disputes involving ministerial employees. Ministers can enforce their employment contracts. *See Petruska* v. *Gannon Univ.*, 462 F.3d 294, 310 (3d Cir. 2006) (considering minister's employment claim brought "pursuant to her contract with [the religious institution]"). They can redress injuries caused by a church's tortious acts. *See Rweyemamu*, 520 F.3d at 208 ("[t]he minister struck on the head by a falling gargoyle as he is about to enter the church may have an actionable claim"). And victims of abuse by clergy can sue the churches that employed the abusers. *See Malicki* v. *Doe*, 814 So. 2d 347, 361 (Fla. 2002) ("the Free Exercise Clause is not implicated in this case because [of] the conduct sought to be regulated; that is, the Church Defendants' alleged negligence in hiring and supervision is not rooted in religious belief"). These cases reflect a foundation of our nation's approach to religious liberty: "[C]hurches are not—and should not be—above the law." *Rayburn*, 772 F.2d at 1171.

These decisions also illustrate that litigation over a church's practices does not necessarily interfere with that church's religious beliefs or require courts to interpret its religious doctrine. In the words of then-Justice Rehnquist, these concerns "are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged." *Gen. Council on Fin. & Admin. of United Methodist Church* v. *Superior Court*, 439 U.S. 1355, 1373 (1978) (Rehnquist, Circuit Justice).

B. This basic premise should apply with equal force to cases arising under laws prohibiting employment discrimination and retaliation against ministerial employees. When the law prohibits conduct unmotivated by religion, the religious entity suffers no First Amendment harm. For example,

- A Catholic church need not hire a female priest and an Orthodox Jewish congregation need not hire a female Rabbi. But the First Amendment does not permit an otherwise egalitarian church to fire a female Sunday-school teacher (or its leaders to sexually harass her) when the firing resulted from an individual pastor's purely personal belief that women should not work outside the home.

- A religious body can choose to hire only female ministerial employees if its religious beliefs prohibit the participation of men. *See Z Budapest's Manifesto*, Circle of Aradia, http://www.circleofaradia.org/z.htm (last visited Aug. 4, 2011) (member of Dianic Wiccan Religion does not believe in "teaching [its] magic and [its] craft to men");

RCG-I Membership, Re-Formed Congregation of the Goddess, International, http://www.rcgi.org/members/members.asp (last visited Aug. 4, 2011) (religious beliefs limit membership to women). But a congregation equally open to both men and women could not refuse to hire the former due to a supervisor's personal belief that men are untrustworthy.

- A temple need not hire a Frenchman to lead worship services if its teachings exclude Europeans from its ranks. *See Frequently Asked Questions*, The Moorish Science Temple of America, http://www.themoorishsciencetempleofamerica.org/comments_and_faq.html (last visited Aug. 4, 2011) ("Can Europeans join the MSTA? NO!"). But a court need not permit a congregation to discriminate against that same Frenchman when the decision is instead motivated by a deacon's purely personal xenophobia.

- A ministry need not hire an African-American preacher if its religious teachings proclaim the superiority of whites. *See Doctrinal Statement of Beliefs*, Kingdom Identity Ministries, http://www.kingidentity.com/doctrine.htm (last visited Aug. 4, 2011) ("the White, Anglo-Saxon, Germanic and kindred people to be God's true, literal Children of Israel"). But a church that embraces racial equality may not engage in race discrimination simply because a hiring official happens to be a white supremacist.

In sum, "[p]reventing discrimination can have no significant impact upon the exercise of [religious] beliefs [when] the Church proclaims that it does not believe in discriminating." *EEOC* v. *Pac. Press Pub.*

Ass'n, 676 F.2d 1272, 1279 (9th Cir. 1982). This principle should govern application of the ministerial exception.

Limiting the ministerial exception to conduct motivated by religion would echo the Court's approach to balancing the right to expressive association against the state's compelling interest in prohibiting discrimination. *See* U.S. Br. 30–31. To establish that the right of expressive association is truly at stake, an organization seeking a First Amendment-based exemption from an anti-discrimination law must demonstrate that compliance with that law would actually impair the organization's association or message; the biases of individual officers do not control if unrelated to the group's mission or message. Thus, in *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984), the organization was required to comply with laws prohibiting gender discrimination because it had "failed to demonstrate that [compliance] imposes any serious burdens on the male members' freedom of expressive association." *Id.* at 626. The Court reached the opposite conclusion in *Boy Scouts* v. *Dale*, 530 U.S. 640 (2000), but only after concluding that the organization's right to expressive association would be impaired if it were required by state law to retain a gay scoutmaster in a leadership position. *See id.* at 650–51.

Of course, courts may not adjudicate "controversies over religious doctrine." *Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. at 449. Thus, so long as the assertion is sincere and not a pretext, a court should not second-guess a religious entity's contention that religious doctrine—rather than secular animus or naked retaliation—

motivated conduct that would otherwise constitute unlawful discrimination or retaliation against a ministerial employee. But when the religious body does not claim that its conduct was motivated by religion, or when such a claim is insincere or pretextual, the Religion Clauses do not excuse that entity from complying with the law.

Petitioner has little basis for its concern that, under this regime, "a judge or jury [will] appoint[] a minister." Pet'r Br. 26. As the United States details, courts have the discretion to forgo reinstatement when it would be inappropriate to require the employer to rehire the plaintiff. *See* U.S. Br. 34–35. Courts exercise this discretion even when plaintiffs prevail against secular, for-profit employers. *See, e.g.*, *Cowan* v. *Strafford R-VI Sch. Dist.*, 140 F.3d 1153, 1160 (8th Cir. 1998) ("where reinstatement presents so extreme a burden this remedy becomes impossible").[2] In still other cases (like this one), the plaintiff will not even ask to be reinstated. Perich Br. 58 ("Perich no longer seeks reinstatement."). Petitioner's fear of forced reinstatement, then, does not justify barring all claims by ministerial employees.

C. Courts should be especially wary of interpreting the ministerial exception more broadly than re-

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[2] *See also, e.g.*, *McKnight* v. *Gen. Motors Corp.*, 973 F.2d 1366, 1370 (7th Cir. 1992) ("several factors may persuade the district judge after careful consideration in a particular case that the preferred remedy of reinstatement is not possible or is inappropriate"); *Duke* v. *Uniroyal Inc.*, 928 F.2d 1413, 1423 (4th Cir. 1991) ("notwithstanding the desirability of reinstatement, intervening historical circumstances can make it impossible or inappropriate").

quired by the Constitution. This judge-made exception interferes with the application of democratically enacted statutes. And these statutes promote the nation's compelling interest in preventing invidious discrimination and retaliation.

In enacting the nation's civil rights laws, Congress took specific steps to accommodate the free exercise rights of religious organizations. For example, both Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-1(a), and Title I of the Americans with Disabilities Act, 42 U.S.C. § 12113(d), provide defenses that allow religious organizations to discriminate on the basis of religion, even in hiring individuals for non-ministerial positions. *See, e.g., Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 329 (1987). Despite what Petitioner says, Pet'r Br. 18, courts have read these statutory exemptions broadly, to enable religious institutions to employ individuals who share their faith and follow their doctrine.[3] But Congress did not give religious institutions blanket immunity. *See* U.S. Br. 15–18.

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[3] *See, e.g., Hall* v. *Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 624–25 (6th Cir. 2000) (dismissing religious discrimination claim of woman who was fired for supporting gay rights, contrary to church teachings); *Little* v. *Wuerl*, 929 F.2d 944, 946, 951 (3d Cir. 1991) (rejecting discrimination claim of woman terminated for getting divorced and remarried in violation of Catholic doctrine); *Leavy* v. *Congregation Beth Shalom*, 490 F. Supp. 2d 1011, 1018 (N.D. Iowa 2007) (under ADA, "a religious organization may give preference in employment to members of its own denomination and may require that employees conform to the organization's religious doctrine").

Because the ministerial exception provides an additional, judge-made defense against enforcement of otherwise generally applicable employment laws, it can be justified only by the need to safeguard a constitutional right that the statutory scheme leaves unprotected. That need is fulfilled by a ministerial exception that protects religious organizations from suits by ministerial employees challenging employment decisions that are motivated by religion. There is no basis for a broader rule that immunizes religious organizations from employment decisions that are neither motivated by religion nor authorized by statute. *Cf. Am. Elec. Power Co.* v. *Connecticut*, 131 S. Ct. 2527, 2537 (2011) ("[W]hen Congress addresses a question previously governed by a decision rested on federal common law, . . . the need for such an unusual exercise of law-making by federal courts disappears.") (quotations omitted, alteration in original). This Court long ago rejected the argument that "the First Amendment requires the [government] to adopt a rule of compulsory deference to religious authority . . . even where no issue of doctrinal controversy is involved." *Jones* v. *Wolf*, 443 U.S. 595, 605 (1979).

A broader ministerial exception, which would permit religious entities to discriminate or retaliate for reasons unrelated to religion, would also collide with the Court's admonition in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), that courts should not unilaterally craft religious exemptions unless those exemptions are required by the Constitution. As the Court explained in *Smith*, "to say that a [religious] . . . exemption is permitted, or even that it is desirable, is not to say that it is constitutionally

required, and that the appropriate occasions for its creation can be discerned by the courts." *Id.* at 890.

In addition to exceeding the requirements of the Constitution, a broader ministerial exception would obstruct Congress's efforts to prevent and redress pernicious forms of discrimination and retaliation—a goal that "plainly serves compelling state interests of the highest order." *Roberts*, 468 U.S. at 624. *See also Bob Jones Univ.* v. *United States*, 461 U.S. 574, 604 (1983) ("the Government has a fundamental, overriding interest in eradicating racial discrimination"); *EEOC* v. *Miss. Coll.*, 626 F.2d 477, 488 (5th Cir. 1980) ("[T]he government has a compelling interest in eradicating discrimination in all forms."). Indeed, a categorical safe-harbor, even for conduct not motivated by religion, "would seriously undermine the means chosen by Congress to combat discrimination." *Id.* at 489.

The risk of undermining anti-discrimination laws is far from hypothetical. Petitioner asserts, without authority, that "[w]hen an employee performs important religious functions, the proffered [reasons for termination] are nearly always religious." Pet'r Br. 14. In fact, courts have applied the blanket ministerial exception to foreclose judicial inquiry into terminations even when the defendant has not linked its actions to a basis in religion. *See, e.g.*, *Rosati* v. *Toledo, Ohio Catholic Diocese*, 233 F. Supp. 2d 917, 918–19, 922–23 (N.D. Ohio 2002) (dismissing ADA suit brought by nun terminated after diagnosis of breast cancer, without any inquiry into whether discharge was motivated by religion).

Likewise, the blanket exception has prevented redress for the most flagrant forms of harassment,

even when lacking any theological justification. For instance, it has precluded a constructive-discharge claim by an African-American ministerial employee who was told that he "would not be able to work with white pastors" and was called a "Nigger"—even though the defendant, a national Lutheran church, did not assert that this race-based conduct related to the church's mission, beliefs, or message. *See Gomez* v. *Evangelical Lutheran Church in Am.*, No. 1:07CV786, 2008 WL 3202925, at *5 (M.D.N.C. Aug. 7, 2008).

Female employees in ministerial positions have encountered similar obstacles under the blanket exception, which has prevented redress for sexual harassment even where the defendants have asserted no religion-based justification for the harassing conduct. *See, e.g.*, *Elvig* v. *Calvin Presbyterian Church*, 375 F.3d 953, 966–69 (9th Cir. 2004) (ministerial exception prevented associate pastor from redressing adverse-employment actions following sexual harassment, and even from inquiring into defendant's motivation for the harassment). When applied to scenarios like these, the exception transcends the protection of religious liberty and instead resembles "a limitless excuse for avoiding all unwanted legal obligations." *Africa* v. *Com. of Pa.*, 662 F.2d 1025, 1030 (3d Cir. 1981) (citation omitted).

II. The Ministerial Exception Permits Courts To Determine Whether An Asserted Religious Justification Is Pretextual.

Just as the ministerial exception should not immunize religious entities from liability for conduct unrelated to religion, the exception must permit courts to determine when a religious justification is

offered as a pretext to mask conduct that resulted from personal animus or naked retaliation. And when the defendant offers a religious reason, the pretext inquiry need not burden religion or force courts to interpret church doctrine.

Rather, the pretext inquiry places courts in a familiar position: Determining whether the asserted religious justification actually prompted the defendant's actions or whether, instead, it is a rationale developed later for use in litigation. *See* U.S. Br. 38 n.9. This type of inquiry is well established and its importance widely accepted. Lest litigants invent sham beliefs to claim religious exemptions, "[s]tates are clearly entitled to assure themselves that there is an ample predicate for invoking the Free Exercise Clause." *Frazee* v. *Ill. Dept. of Emp't Sec.*, 489 U.S. 829, 833 (1989). And whenever it offers a religious accommodation, the government "must necessarily inquire whether the claimant's belief is 'religious' and whether it is sincerely held." *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 726 (1981).

Despite Petitioner's suggestion, Pet.'s Br. 54, the familiar judicial inquiry into religious sincerity does not become a quagmire in the context of hiring and firing. On the contrary: The government "violates no constitutional rights by merely investigating the circumstances of [an employee's] discharge . . . if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge." *Ohio Civil Rights Comm'n* v. *Dayton Christian Sch., Inc.*, 477 U.S. 619, 628 (1986). And courts regularly assess whether an asserted religious motivation is merely a pretext for an act propelled by secular concerns.

First, courts assess sincerity in Title VII claims brought by non-ministerial employees. *See, e.g.*, *Cline* v. *Catholic Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir. 2000) (case turns on whether "St. Paul's nonrenewal of [her] contract constituted discrimination based on her pregnancy as opposed to a gender-neutral enforcement of the school's premarital sex policy"); *Ganzy* v. *Allen Christian Sch.*, 995 F. Supp. 340, 350 (E.D.N.Y. 1998) ("religious motives may not be a mask for sex discrimination in the workplace").

Second, courts inquire into sincerity in Free Exercise cases. Any student of the Religion Clauses knows that "while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held'"—and that "[t]his is the threshold question of sincerity which must be resolved in every case." *United States* v. *Seeger*, 380 U.S. 163, 185 (1965).

Third, courts evaluate sincerity in cases brought under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq., and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 et seq. *See Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006) (church "demonstrated that its sincere exercise of religion was substantially burdened"); *Cutter* v. *Wilkinson*, 544 U.S. 709, 725 n.13 (2005) (prison officials entitled to ascertain sincerity of prisoner's asserted religious belief before granting requested

accommodation).[4] In so doing, courts have had little trouble avoiding entanglement and other affronts to religious freedom.

The sincerity inquiry has not stifled religious freedom because it typically does not require courts to examine doctrine. Instead, courts use a familiar set of tools to evaluate a litigant's credibility:

- In some cases, courts consider whether the litigant failed to invoke the religious justification until after the employee filed suit. *See, e.g.*, *Lawson* v. *Sec'y, Fla. Dept. of Corr.*, No. 10-10619, 2011 WL 2079195, at *3 (11th Cir. May 25, 2011) (prisoner's asserted Judaism was not sincere, as plaintiff "repeatedly ate non-Kosher food, never attended Jewish prayer services, and refused a work proscription for the Sabbath because the proscription would 'mess up his lawsuit'").

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[4] *See also, e.g.*, *Murphy* v. *Mo. Dept. of Corr.*, 506 F.3d 1111, 1115 (8th Cir. 2007) ("it is necessary to show that the existence of a sincerely held tenet or belief . . . [as] a prerequisite to a 'substantially burdened' claim under RLUIPA"); *Salahuddin* v. *Goord*, 467 F.3d 263, 274–75 (2d Cir. 2006) ("The prisoner must show at the threshold that the disputed conduct substantially burdens his sincerely held religious beliefs."); *United States* v. *Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996) ("Under the RFRA, a plaintiff must establish. . . [that the challenged] governmental action . . . substantially burden[s], [] a religious belief . . . which belief is sincerely held by the plaintiff."); *Goodall by Goodall* v. *Stafford County Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995) ("In analyzing a claim under RFRA, we look first at whether a substantial burden has been imposed on the exercise of sincerely-held religious beliefs.").

- In others, contemporaneous documents provide insight into the employer's thinking at the time of the decision. *See, e.g.*, *Cline*, 206 F.3d at 667 (plaintiff's evidence of pretext included performance reviews indicating "that the school continued to view her as sufficiently qualified to teach").
- In yet others, courts examine whether a religious employer "has treated two employees who have committed essentially the same offense differently." *Curay-Cramer* v. *Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130, 141 (3d Cir. 2006).

Courts, then, have both the tools and ability to consider pretext claims without delving into religious doctrine. *See also* U.S. Br. 42.

Nor, as Petitioner suggests, will the process of discovery in pretext cases lead to impermissible intrusion into the church's religious beliefs. As discussed above in Section I.A., religious bodies already litigate a variety of claims. As they have in the past, courts will continue to control discovery in a manner that avoids undue burdens, including undue burdens on religion. *See, e.g.*, *Rweyemamu*, 520 F.3d at 207 ("a case may proceed if it involves a limited inquiry that, combined with the ability of the district court to control discovery, can prevent a wide-ranging intrusion into sensitive religious matters") (quotations omitted).

Courts also have plenty of experience ensuring that discovery does not overwhelm defendants protected by defenses designed, in part, to alleviate litigation burdens at the outset. For instance, when a government official's qualified immunity defense

turns on factual questions that require investigation and discovery, a court "must exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings." *Crawford-El* v. *Britton*, 523 U.S. 574, 597–98 (1998). The same type of management will enable courts to resolve pretext claims without impermissible intrusion into religious bodies' affairs.

It may turn out that there are particular cases in which courts cannot evaluate a claim of pretext without actually parsing church doctrine or requiring unduly burdensome discovery. The solution is for courts to avoid conducting pretext inquiries in those particular cases—and in those cases alone. Even if the Religion Clauses might require courts to refrain from pretext inquiries in a few cases, there is no reason for courts to abstain when the inquiry poses no problem at all. *See* U.S. Br. 48–51. And by evaluating pretext case-by-case and applying federal anti-discrimination law when religious beliefs are not at issue, the courts will "enjoin only the unconstitutional applications of a statute while leaving other applications in force"—and thus avoid "nullify[ing] more of [the] legislature's work than is necessary." *Ayotte* v. *Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006).

Conclusion

The judgment of the Sixth Circuit should be affirmed.

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AMICUS CURIAE BRIEF

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HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTION PRESENTED

Whether the ministerial exception, which prohibits most employment-related lawsuits against religious organizations by employees performing religious functions, applies to a teacher at a sectarian school who teaches a secular curriculum, but also teaches daily religion classes, is a commissioned minister, and regularly leads students in prayer and worship.

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INTEREST OF *AMICUS*[1]

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States, the Anti-Defamation League ("ADL") is today one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. This case requires a balance between two of ADL's core beliefs: preserving religious freedom and eradicating discrimination.

While ADL counts among its core beliefs strict adherence to the separation of Church and State embodied in the Establishment Clause, it also believes that a zealous defense of the Free Exercise Clause is essential to the health of our religiously diverse society and to the preservation of our Republic. To advance another core belief, ADL is a fervent advocate of the enforcement of anti-discrimination laws that aim to eradicate discrimination. In furtherance of these core beliefs, ADL has participated in the major

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[1] Pursuant to Rule 37.3(a) of the Rules of this Court, *amicus* files this brief with the consent of all parties, as they have filed consent letters with the Clerk of this Court. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person, other than *amicus* and its counsel, made a monetary contribution to its preparation or submission.

Church-State and discrimination cases of the last half-century.[2]

ADL is opposed to any infringement on the protections afforded to both individuals and religious organizations under the First Amendment, as such protections are fundamental to the ideals upon which this country was founded. However, discrimination against individuals is a corrosive element in society that Congress and the states have sought to combat through the passage of anti-discrimination laws. It is at the intersection of these two ideals where this Court is asked to render an opinion that is at the heart of this action.

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[2] *See, e.g.*, ADL briefs *amicus curiae* filed in *Ricci v. DeStefano*, 129 S.Ct. 2658 (2009); *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009); *CBOCS W., Inc. v. Humphries*, 553 U.S. 442 (2008); *Van Orden v. Perry*, 545 U.S. 677 (2005); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Lee v. Weisman*, 505 U.S. 577 (1992); *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481 (1986); *The Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Runyon v. McCrary*, 427 U.S. 160 (1976); *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Engel v. Vitale*, 370 U.S. 421 (1962); and *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948).

Requiring religious institutions to clearly demonstrate that an employee falls within the ministerial exception strikes an appropriate balance that does not offend the First Amendment and works toward realizing the compelling interest of eradicating workplace discrimination.

SUMMARY OF THE ARGUMENT

A presumptively deferential view of the ministerial exception allows the exception to swallow the rights of countless individuals to be free from discrimination. The proper means of assessing the ministerial exception is to accord it the status of an affirmative defense. In that way, courts can strike a proper balance between the compelling interest of eradicating discrimination and guaranteeing First Amendment protections.

Surely, the wall of separation between Church and State and freedom to exercise one's own religion must remain strong. However, a commitment to the eradication of discrimination is also of the "highest order." The two interests of prohibiting discrimination and maintaining First Amendment guarantees can co-exist, as district courts may review such claims on the merits with certain sensitivity to First Amendment concerns. With co-existence achieved, a factual inquiry is needed as to the merits of the claims so as to preserve such balance. This factual inquiry should

take place within the context of an affirmative defense. If such factual analysis is viewed under a Rule 12(b)(1) motion, the plaintiff lacks adequate legal safeguards. Therefore, a Rule 12(b)(6)/Rule 56 approach to the application of the ministerial exception is warranted. Moreover, a Rule 12(b)(1) approach fails because the district court does not lack subject matter jurisdiction relative to anti-discrimination claims under statutes that confer such jurisdiction on it. That approach unduly shuts the door to meritorious claims, without the appropriate factual development needed.

The First Amendment cannot be used to provide religious institutions with blanket immunity. Rather, plaintiffs must have the opportunity to be heard on the merits of their claim. Treating the ministerial exception as an affirmative defense promotes a consistent application of comparable exceptions to discrimination laws.

ARGUMENT

I. TREATING THE MINISTERIAL EXCEPTION AS AN AFFIRMATIVE DEFENSE IS THE BEST WAY TO STRIKE A BALANCE BETWEEN ERADICATING DISCRIMINATION AND PROTECTING FIRST AMENDMENT GUARANTEES TO RELIGIOUS ORGANIZATIONS.

A. Treating the Ministerial Exception As An Affirmative Defense Would Advance the Compelling State Interest of Eradicating Discrimination Without Offending First Amendment Guarantees.

It cannot be overstated that the government has a compelling interest in eradicating discrimination. Indeed, this compelling interest is one of the "highest order" where "Congress has clearly targeted the elimination of all forms of discrimination as a 'highest priority.'" *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985); *E.E.O.C. v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1280 (9th Cir. 1982); *See E.E.O.C. v. Miss. Coll.*, 626 F.2d 477, 488 (5th Cir. 1980). As government has a compelling state interest in its anti-discrimination laws, plaintiffs are allowed to bring claims against religious organizations relative to secular employment decisions. Thus, the district court should be free (and indeed, must be free) to delve into the merits of a plaintiff's

claim of discrimination in order to ascertain whether the ministerial exception applies in each such case.[3]

Moreover, this approach to the ministerial exception would in no way infringe upon First Amendment religious freedom guarantees that rightly protect America's religious institutions. Indeed, various courts have found that an examination of the merits of discrimination claims may proceed without interference or entanglement into religious institutions' religious or ecclesiastical governance or doctrine. Rather, an examination on the merits is the best way to guarantee the proper balance between the eradication of discrimination and the protections afforded under the First Amendment.

Indeed, the Second Circuit opined that First Amendment issues need not form the basis for rejecting a discrimination claim if the district court proceeds in a manner that is sensitive to First Amendment concerns. *See DeMarco v. Holy Cross High*

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[3] The Ninth Circuit cited this Court's opinion in *U.S. v. Lee*, 455 U.S. 252 (1982) as an example of how a compelling interest can override a religious belief. *Pac. Press*, 676 F.2d at 1280. In *Pac. Press*, the Ninth Circuit opined how "[a]lthough compulsory participation in the social security system interferes with the free exercise of Amish beliefs, the [Supreme] Court held that the state may justify a limitation on religious freedom by showing that it is essential to accomplish an overriding governmental interest." *Id.* Since Title VII of the Civil Rights Act of 1964 ("Title VII") and other anti-discrimination laws present such a similar compelling interest, the court can explore the merits of a plaintiff's claim while viewing the ministerial exception as an affirmative defense. *See id.* at 1281.

Sch., 4 F.3d 166, 170-171 (2d Cir. 1993). A presumption that a religious motive asserted by a religious organization is plausible "in the sense that it is reasonably held or validly held" allows the fact-finder to avoid the entanglement issue in most cases.[4] *Id.* at 171. When such precautions are put into place and in situations where such duties are "easily isolated and defined," "the able district judge will be able to focus the trial upon whether (the plaintiff) was fired because of the (plaintiff's protected class) or because of failure to perform religious duties, and that this can be done without putting into issue the validity or truthfulness of (such religion's) religious teaching." *Id.* at 172.

Similarly, the Third Circuit has found that where a plaintiff does not challenge the validity or good faith of the religious doctrine in question, then the First Amendment issue of entanglement does not appear. *Geary v. Visitation of Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 329-330 (3d Cir. 1993). According to *Geary*:

> . . . when the pretext inquiry neither traverses questions of the validity of religious beliefs

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[4] "Without doubt there are circumstances where a government official's involvement in matters of religious doctrine constitutes excessive government entanglement. But it does not follow . . . that the mere act of inspection of religious conduct is an excessive entanglement. The Constitution, far from forbidding government examination of assertedly religious conduct, at times *compels* government officials to undertake such inquiry in order to draw necessary distinctions." (citations omitted). *Bronx Household v. Bd. of Educ.*, 2011 WL 2150974 at *14 (2d Cir. 2011).

> nor forces a court to choose between parties' competing religious visions, that inquiry does not present a significant risk of entanglement. However, the First Amendment dictates that a plaintiff may not challenge the validity, existence or 'plausibility' of a proffered religious doctrine.

Geary, 7 F.3d at 330.

Thus, the employee may still be able to contend that the asserted religious rationale did not motivate the adverse employment action. Such a view is consistent with this Court's prior holding in *Jones v. Wolf* relative to the fact that there is no impingement on the Free Exercise Clause either. *Jones v. Wolf*, 443 U.S. 595, 606 (1979) ("The neutral-principles approach cannot be said to 'inhibit' the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, *hire employees*, or purchase goods.") (emphasis added).

B. The Presumptive Deferential Approach to the Ministerial Exception Advocated By Petitioner Would Strike an Inequitable Balance Between Eradication Of Discrimination and First Amendment Protections That Would Deny Anti-Discrimination Protections to A Large Portion of The Workforce.

Petitioner advocates a presumptively deferential ministerial exception standard grounded in the

First Amendment's Free Exercise and Establishment Clauses. This is the wrong approach, as it would deprive employees of anti-discrimination protections. In the context of employment, the First Amendment should not be used offensively, but only defensively – as a legal mechanism afforded to religious organizations through the ministerial exception. In other words, a "tolerant First Amendment is wary of the power of churches to oppress individuals and therefore insists that the First Amendment allows no 'citizen [or church] to become a law unto himself.'" (citation omitted). Leslie C. Griffin, *Fighting the New Wars of Religion: The Need for a Tolerant First Amendment*, 62 Me. L. Rev. 23, 46 (2010). An overly deferential application of the ministerial exception, however, can enable a religious organization to offensively classify a large category or class of employees as "ministers" in an attempt to cloak itself in a veil of immunity. Thus, a robust review of a factual record on the merits of the plaintiff's claims is necessary as employees would be deprived of their right to be free from discrimination if courts defer to a religious organization's classification under such deferential approach.

> The exception is supposed to serve the valid tolerant goals of keeping the state from interpreting religious dogma, intruding on church autonomy, and imposing clergy on the churches. In practice, however, the ministerial exception has extended far beyond that point and become a grant of immunity blocking lawsuits against churches and allowing them to become a law unto themselves. Despite the name of the exception, the cases

> have not been limited to ministers and priests. Female or gay high school teachers, secretaries, university professors, organists, and choir directors, among others, have had their discrimination lawsuits dismissed because of the churches' religious freedom to hire as they wish without court interference. In other words, antidiscrimination law is not the same for religious as it is for secular organizations. (citations omitted).

62 Me. L. Rev. at 53.

"Employment discrimination unconnected to religious belief, religious doctrine, or the internal regulations of a church is simply the exercise of intolerance, not the free exercise of religion that the Constitution protects." *Id.*

Since the ministerial exception has been held to apply to a multitude of religious organizations outside houses of worship which encompass a variety of entities, such as those involved with investments, schools, medical facilities, assisted care, and other operations, it would then follow that a large portion of the workforce could be subject to such exemption if the deferential standard espoused by Hosanna-Tabor and its *Amici* was applied.[5] In fact, "[t]he

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[5] For example, such approach would strip employees of such anti-discrimination protections in various occupations, whether it be "businesses which process food, sell insurance, invest in stocks and bonds, and run schools, hospitals, laboratories, rest homes and sanitariums" as was noted relative to the hundreds of businesses affiliated with just the Adventist Church. *See Pac.*

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exclusion of a large class of lay employees from Title VII's coverage . . . would undermine the effectiveness of Title VII," which likewise applies to the other anti-discrimination laws, such as the ADA. (citation omitted). Green, *supra* note 5, 30 Hastings Const. L.Q. at 25. Furthermore, it is more likely that there would be abuse or overreach in the application of the

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Press, 676 F.2d at 1280. The scope of such exemption not only touches upon a multitude of businesses, but of positions as well which require a factual determination in order to assess the application of the ministerial exception. "Radiating out from such core activities and relationships (of an internal spiritual activity or relationship), however, are layers of activities and relationships that are less inwardly directed, have more indicia of secularity, and frequently involve individuals who have not voluntarily assented to the spiritual authority of the church: church run soup kitchens and food pantries serving local poor and homeless; interactions with vendors who supply both religious and non-religious commodities; contracts with repairmen who make improvements on church structures. Government regulation of such outward relationships, while indirectly impacting a church's operations, has less effect on its spiritual character." (citation omitted). Steven K. Green, *Religious Discrimination, Public Funding, and Constitutional Values*, 30 Hastings Const. L.Q. 1, 19-20 (2002). "Thus, even though a church operated business may provide an environment for the spiritual growth of its employees and the income derived from the business may finance the church's spiritual ministries, involvement in the commercial market will expectantly involve greater governmental regulation of employment relationships, particularly where the church business operates with secular counterparts." (citation omitted). *Id.* at 20-21. Since the intrusion into a religious organization's governance and affairs in secular functions is minimal, it is appropriate to create a factual record on the merits so as to ascertain the secular nature of the positions in question. *See Pac. Press*, 676 F.2d at 1279-1283.

ministerial exception to this wide swath of employees if the Court adopts such a deferential standard.[6]

C. Under Legal Precedent and Procedure, the Correct Approach is Treatment of The Ministerial Exception As An Affirmative Defense.

Treatment of the ministerial exception as an affirmative defense in the context of discrimination claims is consistent with the treatment of other related exceptions by various courts. Indeed, " . . . courts have consistently held that statutory exemptions, particularly from remedial statutes, must be pled as affirmative defenses."[7]

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[6] A case in point may be found in *E.E.O.C. v. Sw. Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981). The Fifth Circuit recognized that "bestowal of such a designation (as a minister) does not control their extra-religious legal status." *Sw. Baptist*, 651 F.2d at 283. In *Southwestern Baptist*, three categories of employees were identified – faculty, administrative staff, and support staff. *Id.* The Seminary designated *all* of those employees as serving a "ministerial function." *Id.* The district court reviewed the factual underpinnings of such designation and the nature of such positions. In doing so, the district court found that the administrative staff and support staff were not performing duties that were ecclesiastical or religious in nature, and were, therefore, not subject to the ministerial exception. *Id.* at 284-285.

[7] *Spann ex rel. Hopkins v. Word of Faith Christian Ctr. Church*, 589 F.Supp.2d 759, 763 (S.D.Miss. 2008) ("*See Oden v. Oktibbeha County, Miss.*, 246 F.3d 458, 467 (5th Cir. 2001) (holding that defendants waived defense of 'personal staff' exception to Title VII by failing to plead same); *Suiter v. Mitchell Motor*

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Thus, the ministerial exception is an affirmative defense to the claim. It is fundamentally unfair to require that the plaintiff disprove such affirmative defense, which is the standard that Hosanna-Tabor and its *Amici* advocate. More specifically, a determination of the ministerial exception should allow for a determination as to whether such exception has been met within the context of weighing the facts accordingly, with due sensitivity to First Amendment concerns. In this way, courts can properly balance an individual's right to be free from discrimination with First Amendment protections for the religious organizations.

From a First Amendment perspective, it would similarly seem justified to maintain the exception as an affirmative defense. While proper constitutional concern for religion may have led to the ministerial exception, it does not follow that the First Amendment should be used to essentially immunize religious

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Coach Sales, Inc., 151 F.3d 1275, 1279-1280 (10th Cir. 1998) (holding that '[a] claim of exemption is an affirmative defense, which must be specifically pleaded.'); *Jackson v. Seaboard Coast Line R.R. Co.*, 678 F.2d 992, 1013 (11th Cir. 1982) (recognizing that cases 'have generally treated statutory exceptions from remedial statutes as affirmative defenses'); *Schwind v. EW & Assoc., Inc.*, 357 F.Supp.2d 691, 697 (S.D.N.Y. 2005) (defense of exemption under a remedial statute must be specifically pled or will be waived); *see also Vore v. Colonial Manor Nursing Ctr.*, No. 3-03-CV-1660-BD(P), 2004 WL 2348229, at 3 (N.D.Tex. Oct. 19, 2004) (recognizing that '[c]onsistent with the remedial purposes of the ADA, a charge of employment discrimination must be construed with the 'utmost liberality'')").

institutions from employment discrimination suits. Without a full development of the record and treatment with an eye toward having a district court scrutinize it as an affirmative defense, a religious institution may be able to attempt to wrap itself in the cloak of ministerial exception without any presumption on behalf of the plaintiff or factual analysis as to the merits of its actions in order to insulate itself from unlawful conduct.

Moreover, Hosanna-Tabor and its *Amici* seek to have a self-enforcement rule put into place whereby they are the sole arbiters of classifying an individual as a "minister." If successful, religious organizations could be given free reign to characterize an employee's duties or tasks as religious in order to invoke the exception without having the burden of proving that such exception would apply.

In essence, the plaintiff would have the burden of overcoming inferences in favor of the religious organization by having to refute such exception in a Rule 12(b) or Rule 56 proceeding, which is contrary to federal civil procedure and can result in a large class of employees being stripped of their rights under discrimination laws relative to such daunting challenge. *See Sections B & D herein*. Scrutiny of this exception as an affirmative defense would then best serve the interests of individuals and religious organizations as to striking a balance between discrimination laws and First Amendment guarantees.

Contrary to the argument espoused by Hosanna-Tabor and proponents of a deferential standard, a factual inquiry can be perfectly consistent with the protections guaranteed under the First Amendment while allowing for a merits-based review of the plaintiff's claims. For example, this Court has found that "routine and factual inquiries (under the Fair Labor Standards Act) bear no resemblance to the kind of government surveillance the court has previously held to pose an intolerable risk of government entanglement with religion." *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 304 (1985). This Court also recognized that the application of the FLSA in that instance applied to the Foundation's commercial activities which were consistent with First Amendment requirements. *Id.* at 305. Indeed, when viewed with the cited case law for the proposition that the courts may delve into factual inquiries relative to pretext when reviewing the ministerial exception, the path is clear for the ministerial exception to be treated as an affirmative defense.

The need for a robust factual development goes hand-in-hand with the need to review such claims on the merits, while viewing the ministerial exception as an affirmative defense. The benefit of this fact-intensive approach is illustrated by cases involving two similar job titles that yielded different outcomes under the application of the ministerial exception. In *Assemany v. Archdiocese of Detroit*, 434 N.W.2d 233 (Mich. Ct. App. 1988), the Court of Appeals of Michigan found that an organist at a Catholic institution

fell within the ministerial exception, but in *Archdiocese of Wash. v. Moersen*, 925 A.2d 659 (Md. 2007), the Court of Appeals of Maryland held that an organist also working at a Catholic Institution was a secular employee outside the scope of the exception.[8, 9]

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[8] The Court of Appeals of Michigan issued its holding after full discovery and a review on the merits as to whether the plaintiff was a non-secular employee. *Assemany*, 434 N.W.2d at 238. The plaintiff contended that he was simply an organist "who supported defendant's religious activities but did not engage in the propagation of religious doctrine or faith." *Id.* The Court of Appeals found the plaintiff was responsible for selecting and teaching all liturgical music within the parish and that his primary responsibility was to enable and encourage the parish choir and congregation to participate in the liturgy through song. *Id.* Additionally, the Court of Appeals noted that the plaintiff had assumed a pastoral-liturgical leadership role in the parish and was required to have a working knowledge of the Catholic religion and liturgy. *Id.* For the foregoing reasons, the Court of Appeals concluded that the plaintiff was not merely an organist but the head of the musical branch of the Catholic liturgy and engaged in the propagation of Catholic doctrine, as well as the observance and conduct of Catholic liturgy in the congregation. *Id.*

[9] The *Moersen* Court reasoned that a case involving the ministerial exception requires an examination of the role the plaintiff played in the church. *Moersen*, 925 A.2d at 665. Through its examination, the Court of Appeals found that the plaintiff was not prevented from doing his job as an organist by his lack of knowledge of the Catholic faith. *Id.* at 674. The Court of Appeals also noted that it was significant that plaintiff's job did not require a particular human being, as opposed to a CD player, with specific religious-based qualifications. *Id.* at 670. The *Moersen* Court concluded that the plaintiff's position as an organist did not require the plaintiff "to plan worship liturgy, coordinate church and worship activities relating to the church's Music Ministry, rehearse with and conduct choirs, hire

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And in *Clapper v. Chesapeake Conference of Seventh-Day Adventists*, 166 F.3d 1208 (4th Cir. 1998), the Fourth Circuit found that a school teacher at a Seventh-Day Adventist Institution fell within the ministerial exception.[10] However, in *Redhead v. Conference of Seventh-Day Adventists*, 440 F.Supp.2d 211 (E.D.N.Y. 2006), the district court found that a school teacher at a similar institution did not fall within the exception.[11]

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musicians and lower level Music Ministry directors, and write articles about the church's Music Ministry for the weekly church bulletin." *Id.* at 668 & 676. It distinguished the plaintiff in that case from the plaintiff in *Assemany*, because Moersen's basic duties were simply to play the organ at religious services. *Id.* at 674.

[10] The court concluded that the primary duties of full-time teachers at the defendant's school consisted of "teaching and spreading the Seventh-Day Adventist faith and supervising and participating in religious ritual and worship." *Clapper*, 166 F.3d at *7. In arriving at that conclusion, the Fourth Circuit looked to the defendant's Education Code which makes clear that the primary purpose of the school system is the propagation of the Seventh-Day Adventist faith. *Id.* The Fourth Circuit also noted that the school required all full-time teachers to embody the teachings of the Seventh-Day Adventist faith in their professional as well as their personal lives. *Id.* It also found that teachers formally instructed their students on a daily basis in teachings of the Bible, whenever possible, which included teachings of the church in traditional academic curriculum, leading students in prayer and worship at various times throughout the day, and leading students in witnessing activities. *Id.*

[11] In reviewing such facts, the *Redhead* Court found that the plaintiff's teaching duties were primarily secular and did not incorporate Seventh-Day Adventist teachings into secular subjects. *Redhead*, 440 F.Supp.2d at 221. Additionally, the

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The very fact that there are different outcomes in these cases proves that the balance between the eradication of discrimination and ensuring First Amendment protections can be achieved while allowing both values to flourish and co-exist. Indeed, depriving a plaintiff of a fact-intensive review of her claims on the merits would fundamentally undermine her right to be free from discrimination.

D. Rule 12(b)(6) and Rule 56 Are The Appropriate Legal Procedural Mechanisms By Which to Challenge The Ministerial Exception As An Affirmative Defense.

Hosanna-Tabor and proponents of a deferential ministerial exception and disposition at an early stage advocate requiring district courts to dismiss such matters on the face of the complaint or as a jurisdictional bar, with a limited factual record, if any. However, such an approach diminishes the role of the district court in evaluating the facts and places the plaintiff (who has the burden of proof) in the unenviable and daunting task of establishing facts that might not have been discovered or developed at the

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teaching of secular subjects took up the majority of the plaintiff's work day. *Id.* The district court found that religious duties were limited to only one hour a day of Bible instruction and attending religious ceremonies once a year. *Id.* It opined that even through the unpublished *Clapper* case also involved a teacher at a Seventh-Day Adventist school, it did not mean an identical result must be reached. *Id.*

time of such motion being filed, most likely at the outset of the case, and to also challenge such deferential presumption.

The Third, Ninth and Tenth Circuits have instructively ruled that a Rule 12(b)(6) motion is appropriate as applied to the ministerial exception. *See Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006); *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940 (9th Cir. 1999); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648 (10th Cir. 2002).[12, 13, 14]

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[12] In finding that Rule 12(b)(6), not Rule 12(b)(1) was the appropriate means of challenging the claims, the Third Circuit in *Petruska* reasoned that "the question does not concern the court's power to hear the case – it is beyond cavil that a federal district court has the authority to review claims arising under federal law – but rather whether the First Amendment bars (plaintiff's) claims." *Petruska*, 462 F.3d at 302. In essence, the ministerial exception "may serve as a barrier to the success of the plaintiff's claims but it does not affect the court's authority to consider them." *Id.* at 303.

[13] In *Bollard*, the Ninth Circuit expressly stated that the ministerial exception should be viewed within the prism of a Rule 12(b)(6) motion, not one brought under Rule 12(b)(1). *Bollard*, 196 F.3d at 950-951. The *Bollard* Court reasoned that "[f]ailure to state a claim under federal law is not the same thing as failure to establish federal question jurisdiction under 28 U.S.C. §1331." *Id.* at 951. The Ninth Circuit relied on this Court's opinion in *Bell* in finding that "[a]ny non-frivolous assertion of a federal claim suffices to establish federal question jurisdiction, even if that claim is later dismissed on the merits under Rule 12(b)(6)." *Id.* at 951.

[14] In *Bryce*, the Tenth Circuit held that the substance of the motion relative to the church autonomy doctrine was correctly a challenge to the sufficiency of the plaintiff's claim for relief and,

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Consistent within these three well-reasoned opinions is the theme that the underlying discrimination law confers jurisdiction on the court so as to reject the use of a 12(b)(1) motion as a means of securing dismissal through a ministerial exception challenge. In other words, the ministerial exception does not function as a jurisdictional bar, but rather as a defense.

Outside of these Circuits, the Fifth Circuit, for example, has held that the district court would be required to view the case in one of three ways under a Rule 12(b)(1) analysis. "Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts."

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thus more properly subject to a Rule 12(b)(6) motion. *Bryce*, 289 F.3d at 654-655; *See also Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1242 (10th Cir. 2010) (Motion to dismiss based on the ministerial exception is more properly brought as a Rule 12(b)(6) motion or Rule 56 motion. The Tenth Circuit opined that "[t]he essential question then, when considering the ministerial exception, is not whether the district court has the power to consider a plaintiff's claims but rather whether the First Amendment bars [that plaintiff's] claims."). The *Bryce* Court inferred that the ministerial exception was more properly considered to be challenging the legitimacy of the plaintiff's claims for relief, not subject matter jurisdiction. *Id.* at 654-655. The Tenth Circuit also compared the First Amendment's bar of a sexual harassment suit to a government official's defense of qualified immunity, which is often raised in a Rule 12(b)(6) or Rule 56 motion, and concluded that they are similar. *Id.* at 654.

(citation omitted). *Ramming v. U.S.*, 281 F.3d 158, 161 (5th Cir. 2001).

Although some extrinsic evidence may be allowed, an outcome determinative approach or expedience should not outweigh thoroughness in an issue that requires a factual interpretation of an exception as it necessarily requires a review of the context of the merits of the case itself. For practical purposes, once extrinsic evidence is allowed, the issue of jurisdiction is really rooted in a decision as to whether or not to involve a more well-balanced record and whether or not a jury should decide the issue. For example, in a 12(b)(1) motion, the plaintiff does not have the same procedural safeguards as she would in a Rule 12(b)(6)/Rule 56 motion.

It is fundamentally unfair to place the burden on the plaintiff to have to prove her case and also prove that she is not subject to the ministerial exception as Hosanna-Tabor and proponents of a deferential presumption would have this Court find. Hosanna-Tabor and its *Amici* espouse a highly deferential presumption in applying the ministerial exception and suggest that their classification of a "minister" be subject to a rebuttable presumption which must be challenged by the plaintiff under only limited circumstances. Then, their argument goes, the matter would be ripe for early summary disposition based on limited facts as to the narrow enumerated criterion they have created. However, such summary disposition would require unnecessary and unprecedented deference to the religious organization and would thereby eviscerate the

plaintiff's procedural rights under Rule 12(b)(6) and Rule 56 to have all inferences viewed in a light most favorable to the plaintiff. In short, it would turn federal civil procedure on its head.

The instructive guidance of the Courts of Appeals, discussed above, recognizes this critical distinction as applied to the ministerial exception. As the Fifth Circuit has also opined:

> A motion to dismiss for lack of subject matter jurisdiction, Rule 12(b)(1), can be based on the lack of jurisdiction on the face of the complaint. If so, the plaintiff is left with safeguards similar to those retained when a Rule 12(b)(6) motion to dismiss for failure to state a claim is raised – the court must consider the allegations in the plaintiff's complaint as true. But the two motions are treated quite differently when matter outside the complaint is the basis of the attack. Rule 12(b) provides that a motion to dismiss for failure to state a claim will be automatically converted into a motion for summary judgment (Rule 56) if the court considers matters outside the pleadings. This provides an additional safeguard for the plaintiff, for, in addition to having all his allegations taken as true, the trial court cannot grant the motion unless there is no genuine issue of material fact. This protection is not, however, provided the plaintiff who faces dismissal for lack of subject matter jurisdiction. (citations omitted).

Williamson v. Tucker, 645 F.2d 404, 412-13 (5th Cir. 1981); *See also Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977) (Recognizing the critical distinction between Rule 12(b)(1) and Rule 12(b)(6)/Rule 56).

The loss of certain safeguards as noted by the Fifth and Third Circuits above is of critical importance in this context, and cannot be dispensed with summarily.

1. The Legal Precedent In *Bell* And Its Progeny Dictate Against Applying a Rule 12(b)(1) Standard and Favors A Rule 12(b)(6)/Rule 56 Approach.

Hosanna-Tabor and proponents of a deferential ministerial exception favor the approach of barring a discrimination claim at an early stage of litigation by wielding the sword of a Rule 12(b)(1) defense to such claim or by a limited factual review. However, this Court has rejected the use of a subject matter jurisdiction bar when the federal claim giving rise to such cause of action could confer subject matter jurisdiction.

Significantly, this Court found, in *Bell v. Hood*, 327 U.S. 678 (1946), that because the plaintiffs' complaint alleged that the defendants violated the Fourth and Fifth Amendments, that "it cannot be doubted therefore that it was the pleaders' purpose to make violation of these Constitutional provisions the basis

of this suit" and "before deciding that there was no jurisdiction, the district court must look to the way that the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States." *Bell*, 327 U.S. at 681. This Court further opined,

> Jurisdiction, therefore, is not defeated as (defendants) seem to contend, by the possibility that the averments might fail to state a cause of action on which (plaintiffs) could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issue of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then the dismissal of the case would be on the merits, not for want of jurisdiction.

Id. at 682.

The *Bell* Court continued its analysis by identifying certain instances that constitute exceptions where the claim should be dismissed for want of jurisdiction. These exceptions are suits "where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is

wholly insubstantial and frivolous." *Id.* at 682-683. This Court found that, "the right of the (plaintiffs) to recover under the complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." *Id.* at 685; *See also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89-90 (1998). The Tenth and Eleventh Circuits followed this Court's holding in *Bell*.[15] [16] Moreover, the Fifth Circuit specifically

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[15] The Tenth Circuit, in *Peoples v. CCA Detention Ctrs.*, 422 F.3d 1090 (10th Cir. 2005), opinion vacated in part on reh'g en banc, 449 F.3d 1097 (10th Cir. 2006), relied on *Bell* in finding that, "the Supreme Court explained that 'where the complaint . . . is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions[,] . . . *must* entertain the suit'." *Peoples*, 422 F.3d at 1095, *citing Bell*, 327 U.S. at 681-682. The *Peoples* Court further stated that, "the 'two possible' exceptions are claims that 'clearly appear[ ] to be immaterial and made solely for the purpose of obtaining jurisdiction' or claims that are 'wholly insubstantial and frivolous'." *Id.*, *citing Bell*, 327 U.S. at 682-683; *accord Meason v. Bank of Miami*, 652 F.2d 542, 546 (5th Cir. 1981) (Relying on *Bell* in holding that "the district court's dismissal cannot be reconciled with the standard established in *Bell v. Hood*, that a complaint should not be dismissed for lack of subject matter jurisdiction unless the federal claim is 'immaterial and made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial and frivolous'.").

[16] The Eleventh Circuit in *Blue Cross & Blue Shield v. Sanders*, 138 F.3d 1347 (11th Cir. 1998) opined that "under the reasoning in *Bell* and its progeny, federal subject matter exists in this case as long as Blue Cross plausibly is a fiduciary seeking equitable relief" relative to the asserted ERISA claims. *Sanders*, 138 F.3d at 1352. It relied on *Bell's* logic by assuming subject matter jurisdiction unless one of the *Bell* exceptions applied. *Id.* In essence, if a claim presents a plausible basis in federal law,

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applied the *Bell* decision's strict standard for dismissal in a Title VII action.[17]

This Court's analysis and strict standard of dismissal dictate that the appropriate procedural approach is to apply a Rule 12(b)(6) motion (or its conversion to a Rule 56 motion) to the ministerial exception, as followed by the Third, Ninth and Tenth Circuits, in order to treat the exception as an affirmative defense. Whether it is under the ADA or any other law, any determination as to whether the

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subject matter jurisdiction must be assumed. *Id.*; *see also Barnes v. City of Gray*, 2010 WL 797265 at *2 (M.D.Ga. 2010) ("the Supreme Court (in *Bell*) has provided guidance on differentiating between Rules 12(b)(1) and 12(b)(6) in the face of threadbare pleadings . . . lower federal courts should generally assume subject matter jurisdiction and proceed to determine whether the liberally construed complaint states a claim upon which the court could grant relief.").

[17] In *Clark v. Tarrant County, Tex.*, 798 F.2d 736 (5th Cir. 1986), the Fifth Circuit opined that "in cases where the basis of the federal jurisdiction is also an element of the plaintiff's federal cause of action, the United States Supreme Court has set forth a *strict standard for dismissal* for lack of subject matter jurisdiction." *Clark*, 798 F.2d at 741, *citing Bell v. Hood* (emphasis added). The Fifth Circuit logically found that Title VII "both conveys jurisdiction and creates a cause of action." *Id.* It held that "[w]here the challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, and assuming that the plaintiffs' federal claim is neither insubstantial, frivolous, nor made solely for the purpose of obtaining jurisdiction, the district court should find that it has jurisdiction over the case and deal with the defendant's challenge *as an attack on the merits*." *Id.* (emphasis added).

ministerial exception applies to an individual plaintiff must be viewed as being inextricably linked to a merits-based factual determination. Therefore, assuming that the plaintiff's claim is not "insubstantial, frivolous, nor made solely for the purpose of jurisdiction," the district court must have jurisdiction over the case and must deal with any ministerial demurrer as an attack on the merits. Accordingly, under a *Bell* analysis, a ministerial exception defense is best analyzed as an affirmative defense.[18]

II. WITH THE BENEFIT OF A FACTUAL RECORD ON THE MERITS, THE SIXTH CIRCUIT WAS ABLE TO MAKE AN INFORMED DETERMINATION AS TO WHETHER THE MINISTERIAL EXCEPTION APPLIED.

Applying a Rule 56 standard of review, the district court allowed full discovery of the factual issues as to Perich's position with Hosanna-Tabor, and on the merits of the case. Without such factual development, Perich's claims may have been bereft

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[18] A somewhat analogous argument can also be made in a review of this Court's opinion in *Arbaugh*. This Court held that the threshold number of employees under Title VII is not jurisdictional under federal law. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006). Title VII's "employee-numerosity requirement," which limits potential defendants to those maintaining at least fifteen employees, is not a limit on a court's jurisdiction to hear Title VII claims. The requirement is instead a substantive element of a Title VII claim, which means that a defendant must raise the issue prior to verdict or the requirement will be waived.

of pertinent facts essential to determine whether or not the ministerial exception applied to her – thus giving the Sixth Circuit the benefit of a full factual record on the merits upon which to render its decision. With the benefit of such factual record on the merits, the Sixth Circuit was able to make an informed determination as to whether the ministerial exception applied.

CONCLUSION

There is no question that courts must be guardians of the First Amendment guarantees to religious organizations and individuals, and of our anti-discrimination laws. Statutory exemptions and the ministerial exception, properly applied, ensure that a religious organization is protected from undue interference with its ecclesiastical functioning where there is truly a spiritual or ecclesiastical connection between the activities of an employee engaged in clerical activities and the religious organization. However, to adopt a presumptive deferential exception and curtail review of the essential facts in this fact-intensive context deprives countless individuals of their right to be free from invidious forms of discrimination, and threatens to unravel the very fabric of the anti-discrimination tapestry woven into state and federal laws. This Court can properly balance our highest ideals by recognizing the ministerial exception as an

affirmative defense within certain parameters that are sensitive to First Amendment concerns.

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AMICUS CURIAE BRIEF

No. 10-553

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IN THE

Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AMICUS BRIEF OF ANTITRUST PROFESSORS AND SCHOLARS IN SUPPORT OF RESPONDENTS

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I. STATEMENT OF INTEREST

The undersigned (collectively, the "*Amici*") are scholars who study, teach, write, or research antitrust law and policy. *Amici* have an interest in ensuring the proper application of the antitrust laws and in the maintenance of labor markets in accordance with the Sherman Act.

Amici have a particular interest in this matter because a broadly and loosely defined "ministerial exception" has the potential of allowing clergy to form horizontal agreements that would normally be condemned by the Sherman Act. A carefully crafted ministerial exception that does not encroach on the boundaries of the Sherman Act will not increase religious organizations' liability to employment-related suits from their employees, and *Amici* have no direct interest in the specific outcome of this case. However, certain professional associations of clergy organize their labor markets through restraints that, absent First Amendment protections, violate the Sherman Act. *Amici* argue that the ministerial exception was never designed to immunize cartel-like arrangements such as these. In fact, *Amici* further submit that a ministerial exception that conforms to the Sherman Act will protect the hiring interests of religious organizations and will therefore advance their constitutional freedom to hire the clergy of their choice.[1]

---

1. *Amici* are identified in Appendix A. None of the *Amici* has received any compensation related to this matter. The parties to this case have filed blanket letters consenting to the filing of this brief. The letters of consent have been filed with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *Amici*, has contributed monetarily to the preparation or submission of this brief. *Amici's*

II. SUMMARY OF ARGUMENT

Some professional associations of clergy[2] have invoked the ministerial exception to claim immunity from the antitrust laws. In claiming immunity, these clergy feel entitled to construct cartel-like arrangements that, absent such immunity, would violate section 1 of the Sherman Act, 15 U.S.C. § 1 (2006).

The question presented in this case characterizes the ministerial exception as a bar to most "employment-related lawsuits brought against religious organizations by employees performing religious functions." Pet. Br. at *ii. Such a characterization leaves open the possibility that "religious organizations" could include

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professional and academic associations are indicated only for purposes of identification and do not imply their representation of any views other than their own.

2. *Amici* use the term "professional associations of clergy" to describe unincorporated associations comprised of individual clergy members who are not employed by the association. This is consistent with the common definition of professional association, "A group of professionals organized for education, social activity, or lobbying, such as a bar association." BLACK'S LAW DICTIONARY 141 (9th ed. 2009) (alternate definition omitted). Two organizations that can be characterized as professional associations of clergy, for example, are the Rabbinical Assembly and the Ministers Council. The Rabbinical Assembly describes itself as "the international association of Conservative rabbis" that, inter alia, "serves the professional and personal needs of its membership." http://www.rabbinicalassembly.org/about-us. The Ministers Council describes itself as "an autonomous, professional, multi-cultural organization of ordained, commissioned and lay Christian leaders within the American Baptist Churches in the U.S.A." http://www.ministerscouncil.com/WhoWeAre/MissionStatement.aspx.

professional associations of clergy, in addition to churches, religious schools, or other employers of clergy, and that "employment-related lawsuits" could include Sherman Act challenges to cartel-like restraints imposed by professional associations of clergy that control an employment market, in addition to disputes between an employer and its employee. Accordingly, the doctrine's parameters would benefit from a limitation and clarification.

The ministerial exception arose from cases that protected hierarchical religious organizations (i.e. organizations with an "ecclesiastical head") from government intrusion into matters regarding their employment of clergy. This Court has never applied the ministerial exception to all matters of employment, such as employment rules established by professional associations and imposed upon independent congregations. The proper scope of the ministerial exception should extend only to hierarchical organizations, including employers of clergy, and not to professional associations of clergy. The doctrine is designed to insulate certain employer-employee clergy relationships from generally applicable laws. It is not designed to provide general antitrust (or other immunity) to a class of individuals and groups in all employment-related matters.

Limiting the ministerial exception to employers and hierarchies does not injure the Petitioner's case nor does it tilt the Court's calculus of the facts in the matter at hand, but it greatly influences the ability of independent houses of worship in congregational denominations to seek and hire the clergy of their choice. Because a congregation's selection of its religious leaders is so central to its religious mission, an overbroad ministerial exception would limit the

religious freedoms of independent institutions that seek to hire clergy, thereby undermining the very objective the doctrine is designed to advance and expanding the ministerial exception beyond its judicial intent and constitutional logic.

III. THE MINISTERIAL EXCEPTION DOES NOT PROTECT PROFESSIONAL ASSOCIATIONS

As Petitioner highlights, this Court has given constitutional protection against state interference with the "[f]reedom to select the clergy." Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 116 (1952). Protecting this freedom, however, is not straightforward when the interests of an independent house of worship are in tension with a professional association of clergy. A broadly construed ministerial exception that prohibits "employment-related lawsuits brought against religious organizations by employees performing religious functions," Pet. Br. at *ii, would inadvertently block a legal challenge to a clergy-organized employment cartel. Such a grant of immunity would in fact undermine the freedom of some religious organizations to hire whom they want.

This conflict of religious freedoms arises in congregational denominations, which this Court has distinguished from hierarchical denominations. In some congregational denominations, professional associations of clergy have organized restraints on employment and have invoked the ministerial exception to assert immunity from the Sherman Act. But this Court has never extended the protections articulated in *Kedroff* to professional associations.

A. The Ministerial Exception Arose to Insulate Hierarchical Polities from Government Intrusion

When this Court ruled in *Kedroff* that the Constitution prohibits "[l]egislation that regulates ... the appointment of clergy," *Kedroff* at 107-08, it emphasized the hierarchical nature of the defendant church. As a matter of church protocol, there was no doubt as to who in the Russian Orthodox Church appointed clergy and where authority for such hiring (and other) decisions lay. *Id.* at 115 ("This controversy concerning the right to use St. Nicholas Cathedral is strictly a matter of ecclesiastical government, the power of the Supreme Church Authority of the Russian Orthodox Church to appoint the ruling hierarch of the archdiocese of North America."); *see also* Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-09 (1976) (ruling, in a dispute over the defrocking of a priest, that "the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of *hierarchical* polity") (emphasis supplied).

Because the hierarchical nature of the Russian Orthodox Church was instrumental in reaching the result in *Kedroff* (and because the hierarchical nature of the Serbian Orthodox Church was instrumental in reaching the result in *Milivojevich*), this Court was careful in *Kedroff* to rest its decisions on the century-old definition of "hierarchical churches" and to distinguish them from alternative religious structures. Invoking *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 722-23 (1871), the *Kedroff* Court stated that "[h]ierarchical churches may be defined as those organized as a body with other churches having similar faith and doctrine with a

common ruling convocation or ecclesiastical head." *Id.* at 110. Hierarchical churches can be distinguished from a congregational polity, in which "a religious congregation ... by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority." Watson, 80 U.S. at 722; *see also* Milivojevich, 426 U.S. at 708-09; *Maryland & Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 369 (1970) (Brennan, J., concurring). For congregational churches, decisions are made "by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government," Watson, 80 U.S. at 724; *see also* Bouldin v. Alexander, 82 U.S. (15 Wall.) 131 (1872) (affirming the reinstatement of certain church trustees because, recognizing the congregational polity of the Baptist church, "the majority [of church members], if they adhere to the organization and to the doctrines, represent the church.").

The critical distinction between hierarchical and congregational churches is highlighted during the hiring of clergy. In hierarchical churches, hiring authority lies in an "ecclesiastical head," whereas in congregational churches, hiring authority lies in the majority of church members or their elected representatives.

B. The Ministerial Exception Protects Employers and Hierarchical Polities, Not Professional Associations

All of the cases in which this Court articulated the ministerial exception, and all the cases cited by Petitioner to articulate that doctrine, involved prohibiting government

interference in a hierarchical polity. *See* Milivojevich, 426 U.S. 696 (Serbian Orthodox Church); Kreshik v. Saint Nicholas Cathedral, 363 U.S. 190 (1960) (Russian Orthodox Church); Kedroff, 344 U.S. 94 (Russian Orthodox Church); Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1 (1929) (Roman Catholic Church). They produced rulings in which this Court refused to interfere with or issue directives to an authority that makes hiring and employment decisions for clergy. These cases involved paradigmatic instances in which an "ecclesiastical head" possessed authority to make hiring decisions, but they would readily apply to officers in religious organizations—such as a principal of a religious school or a church president—that make equivalent employment decisions concerning clergy. These cases therefore protect other religious organizations that directly hire and employ clergy, such as religiously affiliated hospitals, universities, schools, and assorted houses of worship.[3]

Professional associations of clergy, however, do not resemble these hierarchical organizations and therefore do not fall under this Court's characterization of the ministerial exception. Individual members of these professional associations are employed by other organizations (usually houses of worship), and members affiliate with these associations by, among other things, paying dues and subscribing to a professional code of conduct. Their membership is comprised only of their individual clergy members and does not include houses

3. Petitioner, as an employer of ministers and teachers, readily falls into this category of organizations that fit into the case law. Therefore, applying the ministerial exception only to ecclesiastical heads and employing organizations does not affect Petitioner's treatment under the doctrine.

of worship or other employers of the clergy. While these professional associations often create self-governing rules that concern employment, they are not parties to the employer-employee relationship that the ministerial exception is designed to insulate from legislation.

IV. THIS COURT SHOULD NOT EXPAND THE MINISTERIAL EXCEPTION TO PROTECT PROFESSIONAL ASSOCIATIONS

This Court is well aware that professional associations have a history of violating the Sherman Act, defining codes of conduct—often under the guise of professional ethics—that this Court found to be anticompetitive and harmful to consumer welfare. *See, e.g.*, FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986) (finding a pledge to withhold x-rays from insurers, organized by an association of dentists, to violate the Sherman Act); Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982) (finding a non-profit foundation of doctors to have orchestrated illegal price fixing agreements); Nat'l Soc'y of Prof. Engineers v. United States, 435 U.S. 679 (1978) (finding illegal a code of ethics among engineers that limited price competition); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (ruling that price schedules disseminated and enforced by a local bar association violated the Sherman Act).

Professional associations of clergy present some of the same dangers. Several have established rules governing the process in which their members seek and obtain employment that severely restrict the freedom of independent congregations to hire whom they desire. Specifically, certain associations have instituted policies that (1) require their members to seek employment only

through the association's placement office, (2) require congregations seeking to hire clergy to search for candidates only through that same office, prohibiting searches through the placement offices of alternative associations of clergy, (3) limit whom a congregation may interview, deeming some candidates to be inappropriate for certain positions in spite of a congregation's preference to the contrary, and (4) penalize congregations and clergy that transgress the rules, including threatening to expel offending clergy members and preventing their contact with hiring congregations. *See, e.g.*, Eliot Salo Schoenberg, *Aliyah*, The Rabbinical Assembly, Commission on Placement (2001) at Appendix A.

These restrictive policies resemble restraints that this Court has previously condemned.[4] The rules that bind fellow clergy members to a restrictive placement process (while punishing those who do not comply) and exclude rival organizations constitute horizontal collusion that denies consumer choice, limits output, and restricts price. The restrictive arrangements with independent congregations are vertical restraints that cement the association's

4. The First Amendment does not inoculate political, religious, or expressive organizations from Sherman Act scrutiny, and this Court has long permitted the Sherman Act to regulate conduct that is primarily commercial in nature, as distinct from spiritual or expressive conduct that enjoys First Amendment protection. See FTC v. Superior Court Trial Lawyers Assn., 493 U.S. 411, 426-28 (1990); Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 508-09 (1988); NAACP v. Claiborne Hardware, 458 U.S. 886, 914-15 (1982); Associated Press v. United States, 326 U.S. 1, 19-20 (1944). Lower courts have explicitly deployed this distinction in the religious liberty context. See, e.g.,Costello Pub. Co. v. Rotelle, 670 F.2d 1035, 1048-50 (D.C. Cir. 1981).

incumbent status. Together, the rules limit both the ability of clergy members to freely seek employment and the freedom of participating congregations (who hire those members as clergy) to search and pursue the clergy member whom congregational leaders believe best suits their spiritual needs. Congregations are unable to implement their own placement search or assert individual views on the appropriateness of candidates. Barak D. Richman, *Saving the First Amendment from Itself: Relief from the Sherman Act Against the Rabbinic Cartels*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1808005.

At least one of these associations has rhetorically invoked the ministerial exception and related doctrines to claim immunity from Sherman Act scrutiny of its placement procedures, claiming that any violation of the Sherman Act is constitutionally insulated because the restraints involve the hiring of clergy. *See* Gilah Dror & Julie Schonfeld, *Statement About the Placement System*, RA News Alert (October 2010). This claim currently serves as a purported legal justification to continue conduct that harms both the economic welfare and the religious interests of individual congregations. The *Amici* request that this Court clarify the ministerial exception such that it is well understood to be limited to hierarchical organizations and equally well understood that cartel-like arrangements by professional associations of clergy are not constitutionally protected.

A. Exempting Professional Associations of Clergy from Antitrust Scrutiny Would Cause Economic Harm that the Sherman Act is Designed to Prevent

Like any anticompetitive horizontal restraint among competitors in a common labor market, restraints by clergy inflict precisely the harmful economic consequences that Congress intended to prevent when it enacted the Sherman Act.[5]

First, restraints on the placement process for clergy limit the consumer freedoms of hiring congregations. The exercise of consumer preferences in the marketplace, and the economic forces that those consumer freedoms exert, are paramount to sustaining a competitive market and thus are at the core of antitrust law. This Court has warned that "[a] restraint that has the effect of reducing the importance of consumer preference ... is not consistent with this fundamental goal of antitrust law," *NCAA v. Board of Regents*, 468 U.S. 85, 107 (1984), and that "[a]bsent some countervailing procompetitive virtue ... an agreement limiting consumer choice by impeding the

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5. This Court has recognized that, like any other horizontal collaboration, agreements among professional organizations have the potential for both pro- and anticompetitive consequences. Thus, even while refusing to "fashion[] a broad exemption under the Rule of Reason for learned professions profession's code of ethics," this Court recognized that "[e]thical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason." Nat'l Soc'y of Prof. Engineers, 435 U.S. at 696. Many ethical and religious standards established by professional associations of clergy would likely survive scrutiny under the Rule of Reason, but the restraints on the employment market described herein are much more readily condemned under an abbreviated analysis.

'ordinary give and take of the market place,' cannot be sustained." *Indiana Fed'n of Dentists*, 476 U.S. at 459 (*quoting* Nat'l Soc'y of Prof. Engineers, 435 U.S. at 692). In short, the horizontal restrictions by these professional organizations of clergy "cripple the freedom" of independent congregations as market actors and "thereby restrain their ability to [transact] in accordance with their own judgment." Klor's v. Broadway-Hale Stores, 359 U.S. 207, 212 (1959). Independent congregations deserve the Sherman Act's protection of their consumer freedoms and interests in hiring the clergy of their choosing—in fact, such consumer freedoms are precisely the interests the Sherman Act was designed to protect—and restrictions on these freedoms constitute textbook violations of the Sherman Act.

Second, restraints that limit competition in the labor market for clergy have precisely the economic results predicted by accepted economic theory. Output, as measured by the number of job applicants an independent congregation can interview and consider for its pulpit, is severely restricted, and such a restriction on competition would be expected to elevate the wages secured by those who obtain pulpits. Indeed, recent journalistic accounts indicate that members of associations that create these restraints are remunerated more handsomely than clergy in denominations without those restraints. Josh Nathan-Kazis, *On the Pulpit, Rabbis Earn More Than Christian Clergy*, THE JEWISH FORWARD (Sept. 24, 2010) (finding that rabbis receive significantly higher wages—often double or triple—than Catholic priests and Protestant ministers). By limiting output and competition among members and by restricting the ability of participating

congregations to search widely for ideal candidates, professional associations of clergy can inflate the wages of their own members.

B. Exempting Professional Associations of Clergy from Antitrust Scrutiny Would Restrict Religious Expression

Nothing is more central to a congregation's mission than finding the religious leader that best suits its spiritual needs. Petitioner put it best when, citing *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972), it argued that "[t]he relationship between an organized church and its ministers is its lifeblood." Pet. for Cert. at 9. But an expansive ministerial exception that permits professional associations of clergy to implement otherwise-illegally restrictive placement policies is at cross purposes with this value. Petitioner continued that "allowing the state to interfere in that relationship—effectively allowing judges and juries to pick ministers—would produce 'the very opposite of that separation of church and State contemplated by the First Amendment.'" *Id.* (citing McClure, 460 F.2d at 560). Yet if a court is precluded from enforcing the antitrust laws, then it sanctions coercive arrangements that interfere with a congregation's ability to pursue its religious expression. This also is the very opposite of what is contemplated by the First Amendment.

Indeed, *McClure* and its antecedents, including the 1871 ruling in *Watson v. Jones*, have been held to enshrine "a spirit of freedom for religious organizations," 460 F.2d at 560, and this Court in *Kedroff* explicitly added to this general guarantee the "[f]reedom to select the

clergy." 344 U.S. at 116.[6] If the ministerial exception has been crafted, as these cases suggest, to ensure that religious organizations have unfettered freedom to select their own clergy, then a broadly crafted exception would, given the reality of cartel-like restraints within the professional clergy, undermine its own purpose if it protected professional associations. More generally, if the ministerial exception is intended to safeguard religious freedom for religious communities, then it should not enable arrangements that assert both economic and religious power over independent congregations.

Alternatively, limiting the ministerial exception to hierarchical polities with ecclesiastical heads and to employers with unambiguous hiring authority, and limiting the ministerial exception to employment matters that only concern those parties' employees, would fulfill the doctrine's purpose along all dimensions. It would protect the internal integrity of religious organizations yet would also ensure that the pursuits of one religious organization do not encroach upon the freedom of others.

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6. These ideals predate *Watson* and lie at the core of the Framers' conceptions of religious freedom. In an oft-cited letter to the Reverend Samuel Miller, Thomas Jefferson wrote:

> Every religious society has a right to determine for itself the times for [its] exercises, & the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the constitution has deposited it.

Letter to Rev. Samuel Miller (1808), in 10 THE WRITINGS OF THOMAS JEFFERSON 174-75 (Paul Leceister Ford ed. 1899).

In sum, the ministerial exception is designed to secure the integrity of employment relations in hierarchical religious organizations. But if it extends to professional associations, the doctrine instead would infringe upon the integrity of employing clergy. *Cf.* McClure, 460 F.2d at 558 ("The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern.")

CONCLUSION

For the forgoing reasons, the *Amici* urge the Court to limit the parameters of the ministerial exception such that it does not immunize cartel-like behavior by professional associations that otherwise would violate the Sherman Act. Such a limitation would be consistent with this Court's precedents and would advance the doctrine's underlying purpose of protecting the integrity of religious expression. An expansive ministerial exception would undermine that purpose and would regrettably restrict the freedom of independent congregations to seek out and hire the clergy that best suit their religious needs.

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AMICUS CURIAE BRIEF

No. 10-553

AUG 4 2011

In The
Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF BISHOPACCOUNTABILITY.ORG, THE CARDOZO ADVOCATES FOR KIDS, CHILD PROTECTION PROJECT, THE FOUNDATION TO ABOLISH CHILD SEX ABUSE, JEWISH BOARD OF ADVOCATES FOR CHILDREN, INC., KIDSAFE FOUNDATION, THE NATIONAL BLACK CHURCH INITIATIVE, THE NATIONAL CENTER FOR VICTIMS OF CRIME, SURVIVORS FOR JUSTICE, AND THE SURVIVORS NETWORK OF THOSE ABUSED BY PRIESTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

BishopAccountability.org is a 501(c)(3) corporation that maintains a library in Waltham, MA and a large online archive of documents, reports, and newspaper articles about the sexual abuse of children by persons employed by religious institutions, and the mismanagement by religious leaders of abuse allegations. Our collection of newspaper articles covers sexual abuse in all religions and denominations worldwide. Our document and report collections focus on sexual abuse and mismanagement by employees of Roman Catholic dioceses in the United States and Ireland, but the institutional problems revealed by those documents and reports are common to all religious organizations and to corporations and institutions generally. We also maintain a database of Catholic priests, brothers, nuns, deacons, and seminarians who have been accused of abuse. Our holdings and

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[1] Counsel of record for all parties received notice at least ten days prior to the due date of the *Amici*'s intention to file this brief. On May 3, 2011, Counsel for the Petitioner filed a consent to the filing of *amicus curiae* briefs, in support of either party or of neither party. On May 6, 2011, Counsel for the Respondent, Cheryl Perich, filed a consent to the filing of *amicus curiae* briefs, in support of either party or of neither party. On June 17, 2011, the Solicitor General, on behalf of the EEOC, filed blanket consent, consenting to the filing of *amicus* briefs, in support of either party or of neither party. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *Amici* or their counsel made a monetary contribution to this brief's preparation or submission.

database are often used by law enforcement personnel in their efforts to protect children from future abuse. Our collection offers ample documentation of the barriers that victims of child sexual abuse encounter in coming forward, the beneficial effects of the California window legislation, and the growing awareness in recent years that institutions have covered up the sexual abuse of children by their personnel and thereby created risk for children in the future.

The Cardozo Advocates for Kids ("CAKids") was founded in 2008 at the Benjamin N. Cardozo School of Law in New York City. The student-led organization aims to facilitate social, political and institutional change in order to bring justice for victims of childhood sexual abuse. Through lobbying representatives, hosting academic events, fostering relations between scholars and the community, and initiating grassroots action, the organization hopes to bring about awareness and results. CAKids also maintains a website, sol-reform.com, which provides information and resources about reforming state statutes of limitations for victims of sexual abuse. CAKids has an interest in this case due to the organization's efforts in pursuing justice and concrete policy changes for the benefit of abuse victims, including both children and vulnerable adults.

Child Protection Project ("CPP") is a 501(c)(3) that recognizes that many heinous abuses occur when religious organizations seek and hide behind specific religious exemptions under the law. Child sexual abuse victims often have no recourse to justice because of

arcane statute of limitations laws. We support the removal of the statute of limitations for the crime of child sexual abuse as good public policy. Religions must be good corporate citizens and held to the same standard as secular organizations when dealing with children in their care. These exemptions allow religious organizations to hire people to work with children without performing character background checks routinely required of secular groups and with disastrous results for the children and families in their care. Often religious organizations will provide faith healing only, allowing children and others to suffer or die from preventable illnesses. CPP's interest in this case is to ensure that the door is not opened for the facilitation of sexual abuse in religious organizations.

The Foundation to Abolish Child Sex Abuse ("FACSA") has a mission to influence state and federal governments, courts, the criminal justice system and the media to (1) protect children from sexual abuse; (2) hold those who sexually abuse children accountable; (3) hold institutions which condone and enable the sexual abuse of children accountable; and (4) help child sex abuse victims find justice. Its interests in this case are directly correlated with its mission.

Jewish Board of Advocates for Children, Inc. ("JBAC") is a New York nonprofit corporation whose primary goal is the protection of children from abuse – sexual, physical, emotional – particularly in religious communities, including schools and houses of worship. JBAC advocates before legislatures and courts, seeking new laws and judicial decisions that will

provide religious community children with the highest legal protection possible. JBAC members are primarily drawn from the American Orthodox Jewish community, and include rabbis, attorneys, physicians, mental health therapists, and other community leaders who are greatly anguished at the clergy sex abuse scandal in our Nation. JBAC believes religious institutions should be held legally accountable for their conduct, consistent with core American and Jewish values. The Declaration of Independence declares, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights . . . " The Torah, or Bible, declares at Genesis 1:26-27, that all people are created in the image of God. Granting special status, rights, or immunities to religious institutions, by expansively exempting them from statutory or tort law liability, would be antithetical to these core, shared values.

KidSafe Foundation is a Florida-based 501(c)(3) nonprofit started by two Mental Health Professionals, Educators, Authors and Moms – Sally Berenzweig, MEd, MA, and Cherie Benjoseph, LCSW, who believe that every child deserves the right to be safe. Our mission is to provide prevention education to children, parents, teachers and counselors to decrease child abuse. Over 18,000 children have been through our Prevention Education Programs and thousands of adults have been to our Seminars and Workshops.

As Mental Health Professionals and Educators, we know that 1 in 3 girls and 1 in 6 boys will be

sexually exploited before the age of 18 – those statistics are only the ones who TELL, however MOST children do not. Children don't tell because they feel scared, shame, guilt, embarrassment and many other feelings that only once they become an adult or have received help are they able to report the abuse they suffered. It is a well-known fact that child molesters do not "just" molest one time, it is an ongoing crime that affects the survivors for a lifetime, and as such they deserve to hold these criminals accountable for a lifetime. For that reason and so many more we support the removal of the statute of limitations for the horrific crime of child sexual abuse, and strongly support this *Amicus* Brief on behalf of all the survivors who deserve justice.

The National Black Church Initiative ("NBCI") is a coalition of 34,000 African-American and Latino churches working to eradicate racial disparities in health care, education, housing, and the environment. In addition to our member churches, NBCI is a faith-based health organization dedicated to providing critical wellness information to all of its members. NBCI also runs the Baby Fund in response to the rising tide of abuse, neglect, and death among infants and young children in our society. The Fund will be both a source of assistance and advocacy to meet the needs of children who have little or no voice of their own. The Church's interest is in the moral obligation to protect children. The philosophical and theological underpinnings of the Fund can be understood by all faith communities noting the supreme

value placed upon children in scripture when God said, "Suffer the little children to come unto me, and forbid them not: for such is the Kingdom of God." The NBCI's interest in this case is to further the protection of children.

The National Center for Victims of Crime (National Center), a nonprofit organization based in Washington, DC, is the nation's leading resource and advocacy organization for all victims of crime. The mission of the National Center is to forge a national commitment to help victims of crime rebuild their lives. Dedicated to serving individuals, families, and communities harmed by crime, the National Center – among other efforts – advocates laws and public policies that create resources and secure rights and protections for crime victims. The National Center is particularly interested in this case and this brief because of its commitment to victims of sexual assault and child abuse.

Survivors for Justice ("SFJ"), is a not-for profit organization founded by advocates from within the Strictly Orthodox Jewish community dedicated to providing emotional support and legal assistance to victims of sexual abuse. One of our main goals is to ensure that within our insular community abuse is dealt with in a manner that complies with secular law.

Indeed, while Jewish law (*halacha*) mandates compliance with civil law under the principle that the "law of the land is binding," (*dina demalchusa dina*,) in practice such compliance is discouraged by the

religious leadership within our community. Certain rabbis invoke ancient cultural taboos against "informing" on a fellow Jew to the secular authorities – and other misrepresentations of Jewish doctrine – to ensure that abuse is dealt with "internally," with disastrous consequences for society. Those rare community members who do report can expect to face intimidation, threats and ostracism.

Many of SFJ's clients reported their abuse to rabbis and administrators of religious schools and institutions only to be summoned to religious courts (*bet dins*) ill equipped to conduct a meaningful investigation and often compromised by myriad conflicts of interest and no real power to enforce their "verdicts." These proceedings have invariably resulted in the protection of the abuser and no recourse for the victim.

Government funded Orthodox Jewish organizations such as Agudath Israel of America and Ohel Children's Home and Family Services openly defy civil and criminal statutes with impunity. Recently, Agudath Israel of America sponsored a CLE conference where participants were advised to defy New York State law obligating them to report sexual abuse to the authorities. Instead they were directed to report sexual abuse to their rabbis. These are but a few glaring examples of the danger to society inherent in allowing religious doctrine to trump civil law.

SFJ's interest in this case is that it stands for the belief that only adjudication by the civil justice system, without interference or involvement of religion,

can protect society from the abuse of power that allows predators to thrive and operate freely within our schools and religious institutions.

The Survivors Network of those Abused by Priests ("SNAP") is a not-for-profit agency and is the oldest and largest self-help support group run by and for survivors. The mission of the organization is to heal the wounded and protect the vulnerable. We provide peer counseling in person, on the telephone, by mail. SNAP also hosts conferences and gatherings and provides education and advocacy about clergy sexual abuse. SNAP works to reform secular and church laws and structures to better safeguard children. Founded in 1988, the organization now has groups meeting in 65 cities in the United States with over 10,000 members.

SNAP has an interest in this case as many perpetrators of its members still pose a risk to children and the ruling in this case may impact the ability to expose those perpetrators.

SUMMARY OF ARGUMENT

The Petitioner asks this Court to interpret the First Amendment to mandate immunity for religious organizations from the laws that prohibit discrimination, and retaliation, in the work place. The Respondents rightly respond that Petitioner's broad claim for immunity from the law is misplaced, and no demand for absolute immunity is supported by this Court's precedents. *Amici curiae*, who share a mission to protect

children and vulnerable adults from sexual abuse and assault, are filing this brief for the purpose of making one point: whatever ruling this Court reaches in this case, it should not affect cases involving harm by religious organizations and their employees to third parties.

Any First Amendment questions in this case solely involve a consenting employment relationship between adults, where it is assumed that the ministerial employee voluntarily embraces the religious organization's beliefs and limitations, even if they might be adverse to the religious employee's interests. The Petitioner's implicit theory is that it is, therefore, fair and appropriate to permit the religious employer to engage in otherwise illegal discrimination. Brief for the Petitioner at 14, 18, 32, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, No. 10-553 (U.S. June 2011) [hereinafter "Petr. Br."]. The Petitioner further appears to argue that the First Amendment can and should effectuate religious organizations' internal agreements to avoid and ignore otherwise controlling civil law. Petr. Br. at 2-3, 11, 15, 24, 29, 49, 56-57.

This *amicus* brief is submitted for the purpose of bringing to the Court's attention a doctrinal arena that involves religious institutions and employees, but should not be affected by the decision in this case: sexual misconduct by clergy. Some religious organizations have argued that there ought to be a First Amendment "privilege" that cloaks employment decisions and relationships in cases involving clergy sex

abuse, which would foreclose discovery and litigation in cases brought by child sex abuse victims. Sexual misconduct by clergy and religious employees spans all religious denominations, as the variety of *amici curiae* on this brief attest in their Statements of Interest.

The sexual misconduct cases implicate public interests of the highest order that demand religious organizations be held accountable to tort and criminal law. The protection of children from sexual misconduct is a "government objective of surpassing importance." *New York v. Ferber*, 458 U.S. 747, 756-57 (1982); *see also Brown v. Entm't Merchs. Ass'n*, 564 U.S. ___, ___, 131 S.Ct. 2729, 2736 (2011); *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978); *Ginsberg v. New York*, 390 U.S. 629, 641 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944).

An overly broad interpretation of the so-called "ministerial exception" conceivably could imply that religious organizations' dealings with their clergy are immune from the civil law even beyond cases that involve the employee suing the employer for discrimination. Such an interpretation would put children and vulnerable adults in every religious organization at risk.

ARGUMENT

The First Amendment's Religion Clauses are not a refuge for criminal or tortious behavior that harms

children or vulnerable adults. The criminal and tort laws governing sexual abuse and misconduct are neutral and generally applicable.

Under the Free Exercise Clause, this Court has held religious entities and believers accountable under numerous neutral, generally applicable laws, including those governing drugs and unemployment compensation, *Employment Div. v. Smith*, 494 U.S. 872 (1990); employer Social Security deductions, *United States v. Lee*, 455 U.S. 252 (1982); sales taxes, *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378 (1990); polygamy, *Reynolds v. United States*, 98 U.S. 145 (1879); prison regulation, *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); military conscription, *Gillette v. United States*, 401 U.S. 437 (1971); Sunday closing laws, *Braunfeld v. Brown*, 366 U.S. 599 (1961); social security identification requirements, *Bowen v. Roy*, 476 U.S. 693 (1986), and the federal oversight of federal lands, *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). "Neutral principles of law" also can be applied to religious entities without violating the Establishment Clause. *Jones v. Wolf*, 443 U.S. 595, 602 (1979); *Dayton Christian Schs., Inc. v. Ohio Civil Rights Comm'n*, 766 F.2d 932 (6th Cir. 1985), *rev'd*, 477 U.S. 619 (1986).

This Court has developed its Religion Clause doctrine under a horizon of "ordered liberty," which prohibits targeting or persecution of religion and, at the same time, the imposition of anarchy on the United States.

> The First Amendment's guarantee that 'Congress shall make no law . . . prohibiting the free exercise' of religion holds an important place in our scheme of ordered liberty, but the Court has steadfastly maintained that claims of religious conviction do not automatically entitle a person to fix unilaterally the conditions and terms of dealings with the Government. Not all burdens on religion are unconstitutional.

Bowen v. Roy, 476 U.S. 693, 701-02 (1986) (citation omitted). *See also Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972) ("Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests."). The principle of "ordered liberty" runs through this Court's constitutional doctrine.[2]

The Petitioner is asking this Court to exempt religious organizations from the anti-discrimination laws governing employers on a theory that the Religion

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[2] *See, e.g.*, *McDonald v. City of Chicago*, 561 U.S. ___, ___, 130 S. Ct. 3020, 3032, 3034, 3034 n.11, 3036, 3042, 3047 (2010); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22 (1990); *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 758, 769 (1985); *Gertz v. Robert Welch*, 418 U.S. 323, 341 (1974); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring); *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969).

Clauses demand it. Even the most extreme interpretation of that theory should not affect cases involving any other law, and particularly those laws that apply in circumstances involving sexual misconduct by employees of religious organizations.

I. The First Amendment Is No Defense to Criminal or Civil Liability for Sexual Misconduct by Employees

This Court should reject the notion that the First Amendment forces courts to wear blinders when it comes to the illegal behavior of religious organizations simply because they are religious. The strongest version of the ministerial exception theory treats the issue as "jurisdictional," and forbids courts from even asking whether the discriminatory employment decision is motivated by religious belief. *See, e.g., Petruska v. Gannon University*, 462 F.3d 294, 302-03 (3d Cir. 2006). Such a doctrine violates the Establishment Clause, because it creates a special privilege based on religious status rather than religious belief. It is the equivalent of permitting a religious organization that does not use peyote for religious purposes to use the drug in violation of the law. *Cf. Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) (citing approvingly exemptions for religious peyote use); *see Texas Monthly v. Bullock*, 489 U.S. 1 (1989); *Larkin v. Grendel's Den*, 459 U.S. 116 (1982).

In an employment discrimination case, at the very least, the adverse employment decision should

have to be motivated by a sincere religious belief. This principle was enunciated by the late Judge Edward R. Becker in the original *Petruska* decision, which was withdrawn and reversed by a Third Circuit panel because it was not filed before his death. *Petruska v. Gannon University*, 448 F.3d 615 (3d Cir. 2006), *vacated by Petruska v. Gannon University*, 2006 U.S. App. LEXIS 15088 (3d Cir. June 20, 2006). *See also Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999); *McKelvey v. Pierce*, 800 A.2d 840, 858 (N.J. 2002). This distinction alone could distinguish many clergy sexual misconduct cases, because only rarely does a religious organization in the United States sanction or require child sex abuse.

Mainstream religious organizations have not argued that they have a religious belief requiring child sex abuse or the cover up of child sex abuse. But they have argued that their religious status should be a barrier to discovery or civil and criminal liability in child sex abuse cases. These arguments have been unsuccessful with the vast majority of courts applying this Court's precedents.

The highest courts of the states have held that religious organizations can and should be held responsible for sexual misconduct by their clergy, and that the First Amendment is not a barrier to such liability. *See Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 947-48 (9th Cir. 1999); *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 431-32 (2d Cir. 1999); *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 335-36 (5th Cir.

1998), *cert. denied, Baucum v. Sanders*, 525 U.S. 868 (1998); *Dausch v. Rykse*, 52 F.3d 1425, 1428 (7th Cir. 1994); *Doe v. Liberatore*, 478 F. Supp. 2d 742, 774 (M.D. Pa. 2007); *Doe v. Archdiocese of Denver*, 413 F. Supp. 2d 1187, 1194-95 (D. Colo. 2006); *Dolquist v. Heartland Presbytery*, 342 F. Supp. 2d 996, 1007 (D. Kan. 2004); *Ehrens v. Lutheran Church-Missouri Synod*, 269 F. Supp. 2d 328, 332-33 (S.D.N.Y. 2003); *Smith v. Raleigh Dist. of the North Carolina Conf. of the United Methodist Church*, 63 F. Supp. 2d 694, 705 (E.D.N.C. 1999); *Doe v. Hartz*, 52 F. Supp. 2d 1027, 1065 n.7 (N.D. Iowa 1999); *Smith v. O'Connell*, 986 F. Supp. 73, 77, 81-82 (D.R.I. 1997); *Rashedi v. General Bd. of Church of the Nazarene*, 54 P.3d 349, 354 (Ariz. Ct. App. 2002), *rev. denied*, No. CV-03-0049-PR, 2003 Ariz. LEXIS 100 (Ariz. 2003); *Moses v. Diocese of Colorado*, 863 P.2d 310, 319-21 (Colo. 1993), *cert. denied*, 511 U.S. 1137 (1994); *Carnesi v. Ferry Pass United Methodist Church*, 826 So. 2d 954, 955 (Fla. 2002), *cert. denied*, 537 U.S. 1190 (2003); *Malicki v. Doe*, 814 So. 2d 347, 351 n.2, 357-58, 360-62 (Fla. 2002); *Fortin v. Roman Catholic Bishop of Portland*, 871 A.2d 1208, 1232 (Me. 2005); *Petrell v. Shaw*, 902 N.E.2d 401, 406 (Mass. 2009); *Odenthal v. Minnesota Conference of Seventh-Day Adventists*, 649 N.W.2d 426, 436 (Minn. 2002); *Roman Catholic Diocese v. Morrison*, 905 So. 2d 1213, 1242-43 (Miss. 2005); *McKelvey v. Pierce*, 800 A.2d 840, 850, 857-58 (N.J. 2002); *F.G. v. MacDonell*, 696 A.2d 697, 701 (N.J. 1997); *Strock v. Pressnell*, 527 N.E.2d 1235, 1237 (Ohio 1988); *Turner v. Roman Catholic Diocese of Burlington*, 987 A.2d 960, 972-73 (Vt. 2009); *C.J.C.*

v. Corporation of the Catholic Bishop, 985 P.2d 262, 277 (Wash. 1999). *See also* James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 Wm. & Mary Bill Rts. J. 845, 850 (2003).

Only Missouri continues to embrace the theory that the First Amendment immunizes religious organizations from liability in child sex abuse cases. *See, e.g., Perry v. Johnston*, 641 F.3d 953 (8th Cir. 2011) (following *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997)).

This Court's cases support the many state high court decisions rejecting the First Amendment as a defense to enabling child sex abuse, but there is also an independent historical ground to exclude all cases of sexual misconduct in religious organizations from the reach of First Amendment doctrine. The history of religious liberty guarantees in the United States supports a categorical exclusion of acts of licentiousness by clergy. According to historian John Philip Reid, those in the eighteenth century "'had as great a duty to oppose licentiousness as to defend liberty.'" Marci A. Hamilton, *The "Licentiousness" in Religious Organizations and Why It Is Not Protected Under Religious Liberty Constitutional Provisions*, 18 Wm. & Mary Bill Rts. J. 953, 971 (2010); *see also id.* at 956 ("certain actions were never intended to receive protection under religious liberty guarantees. Among the liberties that were never intended to be protected, clearly, were polygamy and sexual abuse. They were consciously excluded from free exercise protection.") (internal citations omitted).

II. The First Amendment Does Not Stand for "Autonomy" from the Law

Some courts have misnamed the theory at issue in this case as a "church autonomy doctrine." *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 654 (10th Cir. 2002). In the same vein, some religious organizations have attempted to avoid liability for sexual abuse, assault, and harassment by their clergy by arguing that their decisions regarding clergy – even when clergy engage in inappropriate sexual behavior – are protected by what they have styled a "church autonomy doctrine."[3] This Court has never employed "autonomy" to describe its Religion Clause doctrine. Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. Rev. 1099, 1112-13 (2004).

In fact, "autonomy" is at odds with this Court's longstanding doctrine of "ordered liberty." The lower courts have routinely rejected the so-called autonomy defense in clergy sexual misconduct cases. The United

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[3] *See* Brief *Amicus Curiae* of the Church of Jesus Christ of Latter-Day Saints, *Ramani v. Segelstein*, No. 49341, 14-22 (Nev. Oct. 5, 2009), *available at* http://www.scribd.com/doc/40342262/Amicus-Brief-of-Mormon-Church-in-Ramani-v-Segelstein. The same religious organization is arguing for "church autonomy" here. Brief of the U.S. Conf. of Catholic Bishops et al. as *Amici Curiae* in Support of Petitioner at 6-15, 20, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, No. 10-553 (U.S. June 20, 2011), 2011 WL 2470845.

States Court of Appeals for the Second Circuit explained:

> Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract [or, we would add, their liability arising from the commission of a tort], are equally under the protection of the law, and the actions of their members subject to its restraints.

Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409, 431-32 (2d Cir. 1999). *See also Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 947-48 (9th Cir. 1999); *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 337-38 (5th Cir. 1998), *cert. denied, Baucum v. Sanders*, 525 U.S. 868 (1998); *Doe v. Liberatore*, 478 F. Supp. 2d 742, 772 (M.D. Pa. 2007); *Doe v. Archdiocese of Denver*, 413 F. Supp. 2d 1187, 1194 (D. Colo. 2006); *Dolquist v. Heartland Presbytery*, 342 F. Supp. 2d 996, 1005 (D. Kan. 2004); *Smith v. Raleigh Dist. of the North Carolina Conf. of the United Methodist Church*, 63 F. Supp. 2d 694, 705-06 (E.D.N.C. 1999); *Doe v. Hartz*, 52 F. Supp. 2d 1027, 1078 (N.D. Iowa 1999); *Smith v. O'Connell*, 986 F. Supp. 73, 77 (D. R.I. 1997); *Rashedi v. General Bd. of Church of the Nazarene*, 54 P.3d 349, 354 (Ariz. Ct. App. 2002); *Moses v. Diocese of Colorado*, 863 P.2d 310, 319-20 (Colo. 1993), *cert. denied*, 511 U.S. 1137 (1994); *Carnesi v. Ferry Pass United Methodist Church*, 826 So. 2d 954 (Fla. 2002), *cert. denied*, 537 U.S. 1190 (2003); *Malicki v. Doe*, 814 So. 2d 347, 351 n.2, 360-62 (Fla. 2002); *Fortin v. Roman Catholic Bishop of*

Portland, 871 A.2d 1208, 1232 (Me. 2005); *Petrell v. Shaw*, 902 N.E.2d 401, 406 (Mass. 2009); *Odenthal v. Minnesota Conference of Seventh-Day Adventists*, 649 N.W.2d 426, 436 (Minn. 2002); *Roman Catholic Diocese v. Morrison*, 905 So. 2d 1213, 1236-38 (Miss. 2005); *F.G. v. MacDonell*, 696 A.2d 697, 701 (N.J. 1997); *Strock v. Pressnell*, 527 N.E.2d 1235, 1237 (Ohio 1988); *Turner v. Roman Catholic Diocese of Burlington*, 987 A.2d 960, 975-76 (Vt. 2009); *C.J.C. v. Corporation of the Catholic Bishop*, 985 P.2d 262, 277 (Wash. 1999).

III. The Claim to Immunity or Autonomy in This Case Is Particularly Extreme

The Petitioner makes an extraordinarily broad claim in this case: "Like many Christian denominations, the Synod has long taught that Christians should resolve disputes within the church rather than sue each other in the civil courts." Petr. Br. at 7. The Petitioner seems to be taking the position that the Church and School intend to exist separate from the civil law. This is not a position taken by "many Christian denominations," which typically stand by the civil law and justice in the courts.

Nor is it a tenable position under this Court's doctrine, which has not recognized a First Amendment right to avoid the obligations of civil law. In fact, this Court's doctrine has reached the opposite conclusion. *See, e.g., Employment Div. v. Smith*, 494 U.S. 872 (1990); *Gillette v. United States*, 401 U.S. 437 (1971); *Reynolds v. United States*, 98 U.S. 145

(1879). On the Petitioner's theory, the largest segment of believers in the United States mutually agree to avoid civil law and the judicial system, and the First Amendment should protect their intent to avoid legal obligations. This is dangerous territory for children and the vulnerable generally.

In the context of child sex abuse, a number of religious organizations have taken internal positions that induce clergy and members to keep child sex abuse secret. *See* Marci A. Hamilton, *The Rules Against Scandal and What They Mean for the First Amendment's Religion Clauses*, 69 Md. L. Rev. 115, 119-26 (2009); Marci A. Hamilton, *The "Licentiousness" in Religious Organizations and Why It Is Not Protected Under Religious Liberty Constitutional Provisions*, 18 Wm. & Mary Bill Rts. J. at 964-65. Those positions put children in a wide variety of religious settings at extreme risk as many of the *amici curiae* explain in their Statements of Interest.

No interpretation of the First Amendment in an employer-employee relationship should enable these internal systems to trump child abuse reporting requirements, or criminal or civil liability for clergy sex abuse.[4] *Amici*, therefore, ask this Court to distinguish

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[4] Unfortunately, at least one court explicitly has extended the reasoning of the ministerial exception to the child sex abuse context. *See, e.g., Weishuhn v. Catholic Diocese of Lansing*, 756 N.W. 2d 483 (Mich. Ct. App. 2008), *petition for cert. filed*, 79 U.S.L.W. 3370 (Mich. Dec. 6, 2010) (No. 10-760). *Weishuhn* is a case so far removed from reasonable First Amendment

(Continued on following page)

cases involving sexual misconduct by religious employees from a case like this one, which involves solely the question of the employment relationship between a religious employer and an employee that does not involve harm to third parties. This is a position embraced by a broad range of church/state scholars. *See* Angela C. Carmella, *The Protection of Children and Young People: Catholic and Constitutional Visions of Responsible Freedom*, 44 B.C. L. Rev. 1031, 1040 (2003); Marci A. Hamilton, *The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-up*, 29 Cardozo L. Rev. 225, 237-38 (2007); Douglas Laycock, *Church Autonomy Revisited*, 7 Geo. J.L. & Pub. Pol'y 253, 271-72 (2009).

If this Court embraces some version of the ministerial exception, the only laws that should be diminished in any way are those that bar discrimination in the context of an employment relationship. There is no justification to extend the reasoning of any version of the ministerial exception to circumstances involving victims of clergy or religious organizations, or involving any other law, whether that law governs child sex abuse, domestic abuse, divorce, child custody, or property ownership.

The vulnerable require protection from those who harm them whether the cause of the harm is religious

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interpretation that it should be summarily reversed, not held for decision pending a decision in this case.

or not. In every organization, the vulnerable need and deserve to be protected, and like all other organizations, religious organizations need to be made legally accountable when they inflict harm. Civil law is the best route to that end. When religious organizations can and do avoid the law, children especially suffer.[5]

CONCLUSION

Amici curiae BishopAccountability.org, The Cardozo Advocates for Kids, Child Protection Project, The Foundation to Abolish Child Sex Abuse, Jewish Board of Advocates for Children, Inc., KidSafe Foundation, The National Black Church Initiative, The National Center for Victims of Crime, Survivors for Justice, and SNAP respectfully ask this Court to ensure that the First Amendment is not capable of being used as a tool to endanger children in religious organizations

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[5] *See* Joseph Berger, *Killing Rattles a Jewish Community's Long-Held Trust of Its Own*, N.Y. Times, July 14, 2011, *available at* http://www.nytimes.com/2011/07/15/nyregion/leiby-kletzkys-killing-rattles-jewish-communitys-trust.html?_r=1 ("In a spate of cases between October 2008 and October 2009 alone, Brooklyn prosecutors arrested 26 ultra-Orthodox men – rabbis, teachers and camp counselors among them – on sexual abuse charges. Many others have come forward to the Jewish news media and to social agencies. [The local Brooklyn assemblyman] said there was no evidence that sexual abuse or other deviance was any more widespread in the Hasidic community than in other ethnic groups, but what is different, they said, is that the Hasidic community has just begun to grapple with these problems and educate its members.").

by distinguishing cases involving clergy sexual misconduct from the employment relationship issues implicated in this case. *Amici* further request that the Court reject the Petitioner's argument for a capacious theory of unaccountability to the law so as to ensure that children are protected under a shared horizon of ordered liberty.

Respectfully submitted,

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August 9, 2011

AMICUS CURIAE BRIEF

No. 10-553

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In The
Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* NEIL H. COGAN IN SUPPORT OF RESPONDENTS URGING AFFIRMANCE

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QUESTIONS PRESENTED

Amicus curiae respectfully submits that the Court consider the following questions:

1. Whether the text of the Religion Clauses and the "the basic scheme of the Constitution" demand that the federal courts create an affirmative defense of "ministerial exception."

2. Whether the Congress in the Americans with Disabilities Act displaces the power of the federal courts to create and apply an affirmative defense of "ministerial exception" through the provision of a special exemption and specific defenses for religious entities.

3. Whether the federal courts can create and apply a "ministerial exception" to a neutral, generally applicable civil rights statute such as the Americans with Disabilities Act and thereby shield an employer from litigation of a claim of employment discrimination that may be unrelated to the employer's religious beliefs and practices.

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INTEREST OF *AMICUS CURIAE*

Amicus Neil H. Cogan is a member of the bar of this Court, who teaches and writes in the area of civil rights, constitutional law, and jurisprudence.[1] He has been in practice for more than forty years in California, New York, Pennsylvania, and Texas, and has submitted briefs *amicus curiae* to this Court.[2]

Amicus is former dean of Whittier Law School (2001-2009), founding dean of Quinnipiac College (now University) School of Law (1993-2000), and associate dean of Southern Methodist University Dedman School of Law (1988-1993).

He is the editor of *The Complete Bill of Rights* (New York: Oxford University Press, 1997) and *The Constitution in Context* (New York: Foundation Press, 1999), and the forthcoming *Union and States' Rights: 150 Years After Sumter, Interposition, Nullification, and Secession* (Akron: University of Akron Press,

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[1] This brief has been filed with the written consent of the parties, copies of which are on file with the Clerk of Court. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, make a monetary contribution to the preparation or submission of this brief.

[2] Cogan is co-counsel in an unrelated state court case in which defendants have relied upon the "ministerial exception" as an affirmative defense against a state civil rights claim. As *amicus* affirms in footnote 1 and here specifically reaffirms, neither co-counsel nor the client in the state case has made any monetary contribution or has contributed any assistance to this brief in any manner.

2012); *Freedoms and Rights: Law, Democracy, and Culture in Israel* (Durham: Carolina Academic Press, 2012); *Materials on Constitutional Law* (New York: Aspen Publishers, 2013) (with D. Lively).

Amicus has also been a member of the board of directors of three Jewish day schools and has served as president of one school and vice-president of another. These positions notwithstanding, he believes that religious schools should practice non-discrimination when no religious belief or practice requires otherwise and that religious schools act as good citizens when they adhere to and support neutral, generally applicable federal and state civil rights laws.

SUMMARY OF THE ARGUMENT

Deviating from the arguments of the parties, *amicus* respectfully submits that the Court address the separation of powers issues that precede the decision of the question presented herein.

While Petitioner and its supporting *amici* refer to the Americans with Disabilities Act only in passing, that legislation represents the democratic decisions of Presidents George H. W. Bush and George W. Bush, the overwhelming, bi-partisan votes of two Congresses, and the leadership of Senators Orrin Hatch and Edward Kennedy. In signing the Act on July 26, 1990, having witnessed the fall of the Berlin Wall, President Bush said:

> "I now sign legislation which takes a sledgehammer to a . . . wall, one which has for too many generations, separated Americans with disabilities from freedom they could glimpse, but not grasp. Once again, we rejoice as this barrier falls for claiming together we will not accept, we will not excuse, and we will not tolerate discrimination in America."

In urging that the Court build a new wall, a metaphorical wall not founded in the text or structure of the Constitution, Petitioner and its supporting *amici* ask this Court to disregard the democratic decisions noted above and, inconsistently with the Constitution's separation of powers, make law on its own.

Amicus respectfully submits that the Congress has not "directed," and the text of the Religion Clauses and the "basic scheme of the Constitution" do not demand, that the federal courts create a new, implied affirmative defense of "ministerial exception." *American Electric Power Co., Inc. v. Connecticut*, No. 10-174 (June 20, 2011). Accordingly, the federal courts have no power to create the "exception" and exceed the proper role of judicial review.

Even if the Religion Clauses and the basic scheme of the Constitution demand that the federal courts create a "ministerial exception," *amicus* submits that when the Congress protects the civil rights of employees against discrimination and after deliberation specifically provides to what extent religious employers have exemptions and defenses, the federal

courts are displaced from creating additional exemptions and defenses.

Amicus further submits that when the Congress regulates a religious employer by a neutral and generally applicable law, the federal courts may not create an exemption or defense that grants a special privilege to religious employers and that makes them a power unto themselves, separate and apart from the democratic will of the community.

ARGUMENT

I. THE TEXT OF THE RELIGION CLAUSES AND THE "BASIC SCHEME OF THE CONSTITUTION" DO NOT DEMAND THAT THE FEDERAL COURTS CREATE AN AFFIRMATIVE DEFENSE OF "MINISTERIAL EXCEPTION"

Recognizing that the question on which the Court granted certiorari concerns the *scope* of the "ministerial exception," nonetheless *amicus* respectfully submits that before the Court decides that question, it should decide whether the federal courts may create an implied affirmative defense of "ministerial exception" to a federal civil rights employment claim, in this case, the Americans with Disabilities Act. 42 U.S.C. §§ 12111 *et seq.* (hereinafter "ADA").

As framed in the Brief for Petitioner and supported by several *amici*, the question before the Court

is not solely whether the Act as applied to a particular employee under a particular circumstance is constitutional, but whether religious employers such as Petitioner have a "ministerial exception" that makes them generally exempt from the application of the ADA and other federal civil rights and employment statutes due to the employer's self-designation as a religious entity and the employer's designation of an employee as a "minister." For reasons sounding in the text and structure of the Constitution and the text of the statute, *amicus* respectfully submits that the decisions of the courts of appeals notwithstanding, the federal courts have no power to create such an implied affirmative defense to the applicability of the ADA.

Before discussing the issue of displacement in point II, *infra*, *amicus* submits that *at a more general level* the Court's recent opinions in *American Electric Power Co., Inc. v. Connecticut*, No. 10-174 (June 20, 2011); and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), counsel that the federal courts do not have the power or, even if they do have power, that they should exercise hesitancy, to create an implied affirmative defense of "ministerial exception" under the Constitution.

Last Term, in *American Electric Power*, the Court said:

> *Erie* [*Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)] . . . sparked "the emergence of a federal decisional law in areas of national concern." . . . The "new" federal common law

> addresses "subjects within national legislative power where Congress has so directed" or where the basic scheme of the Constitution so demands.

No. 10-174, Slip. Op., p. 7, quoting and relying upon Henry Friendly, *In Praise of Erie – and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 405, 408, n. 119, 421-422 (1964).

In the instant case, the Congress has not directed the federal courts to create federal common law; indeed, to the contrary, as argued below, the Congress has spoken directly to the issue of religious exemption and defenses. But, Petitioners argue, the Constitution – the Free Exercise and Establishment Clauses – empowers the federal courts to create an affirmative, even jurisdictional, defense of "ministerial exception." This, *amicus* respectfully submits, is inconsistent with the text and structure of the Constitution.

Applying *American Electric Power*, *amicus* submits that there is no constitutional demand to create federal common law and that, absent such a demand, the federal courts have no law-making power. The text of the Free Exercise and Establishment Clauses – in providing that "Congress shall make no law" – demands neither a remedy nor an affirmative defense in support of its prohibition. In contrast to, say, the Fifth Amendment, the text is wholly silent about

enforcement, whether in the form of a claim or a defense. For those for whom the history of the text is pertinent, a reading of the drafts of the Religion Clauses shows that while Madison's proposal would have protected "civil rights" and thereby alluded arguably to a remedy, those words were deleted. See Neil H. Cogan, *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* (1997), pp. 1-11.[3]

Consistent with the structure of the Constitution they amend, the Religion Clauses leave to the Congress to legislate, if it wishes, how the Clauses may be enforced. Consistent with the role of the federal courts within the constitutional structure, if in a case otherwise properly before the courts, the application of a federal law is challenged as unconstitutional – e.g., because an issue involves an unconstitutional burden or entanglement – then the courts may decide that issue within its fact-framed context. But it does not follow that the federal courts are empowered to go further and legislate an implied exemption or implied affirmative defense in order to protect against a possible violation of the Clauses. That is, because on some occasions there may arise the burden or entanglement that Petitioner and several *amici* fear, it does not follow that the federal courts are empowered to create a prophylactic defense for every religious

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[3] With profound respect for the scholarship of counsel for Petitioner and several *amici*, their history – even if unchallenged – does not convert the text of the Religion Clauses into a "demand" that the Church be *outside* the jurisdiction of the civilian courts.

entity against every employee whom it designates as a minister because of the mere possibility of that burden or entanglement. If burdens and entanglements become notorious, as they have not, the Congress may consider further exemptions and defenses.

The treatment by the Court of implied remedies under the Constitution illustrates the above. In *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), where petitioner sought an implied remedy under the Free Exercise Clause, the Court stated that implied remedies under the Constitution are "disfavored" and indicated that petitioner's claim would have been dismissed had the government raised the point. 129 S.Ct. at 1948.[4] If the Court denies a remedy for a party plaintiff who may have no alternative to vindicate an asserted wrong, how much more so should it deny a special affirmative defense for a party defendant who is fully able to defend on the merits.

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[4] Forty years ago, the Court recognized that federal courts may create federal common law remedies where the abridgement of a right requires a judicial remedy. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The Court continues to follow the holding in *Bivens*, although two Members have suggested its abandonment. See *Correctional Services Corp. v. Malesko*, 543 U.S. 61, 75 (2001) (Scalia and Thomas, JJ., concurring) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action – decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition. . . . There is . . . reason to abandon it. . . .").

The Court has recognized that the "constitutional scheme" does empower the federal courts to create an affirmative defense of official immunity. Quoting Judge Jose Cabranes, the Court indicated that an immunity defense is "'rooted in the need to preserve the effectiveness of government as contemplated by our constitutional structure. . . .'" 129 S.Ct. at 1945. But our constitutional scheme does not demand an independent realm for religious entities. While our constitutional scheme may recognize the existence of religious entities and give their judgments appropriate respect, it does not follow that our constitutional scheme demands that those entities oust federal and state courts of jurisdiction or preempt federal and state courts from making decisions under federal and state law. Our constitutional scheme does not contemplate that every minister, priest, imam, and rabbi who functions as a teacher, adviser, counselor, or trainer, is by such designation of his or her employer beyond the jurisdiction of the federal and state courts. Each of them is entitled to bring a good faith claim of discrimination under the ADA, and religious entities are entitled, in addition to statutory exemptions, to a case-by-case application of the Religion Clauses to those claims.

The much misused "wall of separation" metaphor cannot be used to hide the uncomfortable and distressing fact that wrongs are sometimes committed by religious entities, including when they act as religious employers. And it cannot be used as an impenetrable wall against democratically chosen claims for justice.

II. THE CONGRESS DISPLACES THE POWER OF THE FEDERAL COURTS TO CREATE AND APPLY A "MINISTERIAL EXCEPTION" TO THE AMERICANS WITH DISABILITIES ACT, WHERE IT HAS PROVIDED A SPECIFIC EXEMPTION AND SPECIAL DEFENSES FOR RELIGIOUS ENTITIES

On a more *specific* level, the Congress displaces the power of the federal courts to create an affirmative defense of "ministerial exception" by its considered deliberation and provision of a specific exemption and special defenses for religious entities under the Americans with Disabilities Act. Further, the Congress has not eliminated the ability of religious entities to assert the unconstitutional application of the statute to a particular claim of discrimination; rather, it has structured when a religious employer is totally exempt and when a non-exempt employer must participate in litigation and show, if it can, that a claim involves an unconstitutional burden on free exercise or entanglement with religious decision-making.

The Court has long recognized that separation of powers requires that the federal courts defer to the Congress when it structures the procedures by which federal claims are litigated, see *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514-515 (1869); *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323, 329-30 (1938); *Felker v. Turpin*, 518 U.S. 651, 658 (1996), as well as when the Congress displaces federal common law. See *American Electric Power Co., Inc. v. Connecticut*, *supra*,

pp. 9-10. The Court has deferred to the Congress in limiting the creation of implied remedies under the Constitution, see, e.g., *Bush v. Lucas*, 462 U.S. 367, 378 (1983) (the Congress's remedial scheme is a "special factor counseling hesitation").[5]

After years of deliberation about the historic discrimination suffered by tens of millions of Americans with disabilities and the inadequacy of federal protection, in 1990, the Congress and the Administration of President George H. W. Bush carefully crafted the Americans with Disabilities Act; and after further deliberation about the inadequacy of the statute, both as written and interpreted, in 2008, the Congress and the Administration of President George W. Bush carefully crafted strengthening amendments. 42 U.S.C. §§ 12101, *et seq.* On both occasions, the legislation was a product of bi-partisan collaboration and overwhelming majorities. Prominent legislative leaders, such as Senators Orrin Hatch of Utah and Edward

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[5] Guidance is found in due regard to the action or even inaction of a coordinate Branch. Thus, in *Bivens*, 403 U.S. 388 (1971), the Court emphasized the significance of "special factors counseling hesitation in the absence of affirmative action by Congress. . . ." Id. at 396. Elaborating the ambit of special factors, the Court said that they have "proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent." *Chilicky v. Schweicker*, 487 U.S. 412, 423 (1988) (O'Connor, J.). "When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies." *Ibid.*

Kennedy of Massachusetts, led the 1990 legislation, with Senator Hatch having a direct and specific role in fashioning the provisions related to religious entities.

In Title I of the ADA, dealing with discrimination in employment, the Congress specifically included an exemption for "religious entities" allowing them to prefer persons of a particular religion. 42 U.S.C. § 12112.[6] In the section on defenses, the Congress provided a general defense, namely, that "[i]t may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter." 42 U.S.C. § 12113(a).

And in the next section, the Congress provided yet a further religious defense, namely, "[t]his subchapter shall not prohibit a religious corporation . . .

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[6] (1) In general. This title shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Religious tenets requirement. Under this title, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation . . . of its activities. 42 U.S.C. § 12113(c)(1). And further, it is a defense that "a religious organization may require that all applicants and employees conform to the religious tenets of such organization." 42 U.S.C. § 12113(c)(2).

By contrast with the specific defenses in Title I, the Congress provided a *complete* exemption to religious entities from the application of Title III, the public accommodations section. "The provisions of this subchapter shall not apply . . . to religious organizations or entities controlled by religious organizations, including places of worship." 42 U.S.C. § 12187.

In fashioning the ADA and its varying exemptions and defenses, the Congress has structured the procedures by which claims are litigated and the substance of exemptions and defenses that are available. The Congress's actions reflect democratic decisions about the need of those with disabilities to participate fully in American life and the need of religious entities to be exempt or otherwise protected. In no provision did the Congress deny the ability of religious entities to raise Free Exercise and Establishment Clause defenses as they apply. At the same time, in the employment section, Congress did not give religious entities complete absolution, as Petitioner and several *amici* urge. As the Court has recognized in its displacement jurisprudence, the Congress need not specifically say that religious

entities do not have a "ministerial exception." The Congress need only speak to the subject of exemptions and defenses, which it so evidently did.

Recognition that direct statements from the Congress displace its own law-making, means of course that the Court is enforcing democratic decision-making. See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, p. 10 (1997) ("once we have taken this realistic view of what common-law courts do, the uncomfortable relationship of common-law lawmaking to democracy (if not to the technical doctrine of separation of powers) becomes apparent."); Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution*, p. 37 (2005) ("[i]ncreased recognition of the Constitution's democratic objective – and an appreciation of the role courts can play in securing that objective – can guide judges both as actors in the deliberative process and as substantive interpreters of relevant constitutional and statutory provisions.").[7]

Two distinguished Presidents and overwhelming majorities of the Congress have spoken twice. The Court should hesitate in holding that their expression of the democratic will notwithstanding, the Church is

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[7] This learning is found analogously in the concurring opinions of Justices Felix Frankfurter and Robert Jackson in *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952), explaining why President Harry Truman was required to adhere to the democratic will expressed by the Congress even in the midst of the war on the Korean peninsula.

wholly exempt from claims by those it deems to be its ministers.

III. THE FEDERAL COURTS HAVE NO POWER TO CREATE A "MINISTERIAL EXCEPTION" TO A NEUTRAL AND GENERALLY APPLICABLE CIVIL RIGHTS STATUTE AND SHIELD AN EMPLOYER FROM LITIGATING A CLAIM OF EMPLOYMENT DISCRIMINATION THAT MAY BE UNRELATED TO THE EMPLOYER'S RELIGIOUS BELIEFS AND PRACTICES

If, despite the absence of a constitutional "demand" for a "ministerial exception" and despite Congressional provision of specific defenses, the federal courts may nonetheless create a new federal common law defense, that defense to the application of the ADA is subject to the standard of scrutiny applied in *Employment Division v. Smith*, 494 U.S. 872 (1990). Under that scrutiny, the federal courts cannot grant to a religious entity a general "ministerial exception" for each of its employees whom it designates a minister, or priest, or imam, or rabbi.

Rather, the federal courts should examine the employment decision that is the basis for the employee's claim under the ADA and determine whether accommodation of the disability would substantially interfere with the employer's practice of religion and, if it would, whether it is rational to require accommodation. A contrary decision, *amicus* suggests, would turn the Free Exercise argument of Petitioner and its

supporting *amici* into an unbounded establishment of religion. Due caution, *amicus* further suggests, counsels further experience with case-by-case litigation of employment discrimination claims brought by employees against religious employers.

CONCLUSION

Amicus respectfully submits that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 10-553

IN THE

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Petitioner,

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INTEREST OF THE *AMICI* [1]

The United States Conference of Catholic Bishops is a nonprofit corporation, the members of which are the active Catholic Bishops in the United States.

[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. No counsel for any party authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no one other than the *amici curiae* and their members made any such monetary contribution.

The Church of Jesus Christ of Latter-day Saints is an unincorporated religious association with over fourteen million members.

The Most Rev. Katharine Jefferts Schori is the Presiding Bishop, Chief Pastor, and Primate of the Episcopal Church, also named the Protestant Episcopal Church in the United States of America, a hierarchical religious denomination with nearly 7,700 worshipping congregations in the United States and other countries. The Church has charged the Presiding Bishop with the responsibility for speaking for the Church on matters of vital importance to the Church, such as those now before the Court.

The Union of Orthodox Jewish Congregations of America ("Orthodox Union") is the nation's largest Orthodox Jewish umbrella organization, representing nearly one thousand synagogues throughout the United States. The Orthodox Union also represents the interests of hundreds of Orthodox Jewish day schools whose primary mission is the inculcation of the Jewish faith in the community's children.

The *amici* share an interest in preserving the freedom of religious organizations to govern themselves and to choose who may serve in ministry. The issues presented in this case have arisen in countless cases in which these *amici* or their members have been involved as parties. The outcome will have a profound impact upon their ability to advance their spiritual and pastoral missions.

SUMMARY OF ARGUMENT

1. The question in this case is whether those who seek to serve a church in a religious capacity may invoke the power of the state in support of their desire to serve—or whether the church has the right

to choose those who perform religious functions without regard to secular standards and without interference by the state. The answer to that question, *amici* submit, is clear. The church has the right to select its ministers, and when the dispute is between the church and the church member who seeks to serve in ministry, there is no occasion—no justification whatsoever—for the state to become involved. Church members who seek to serve the church in ministry may invoke whatever procedure is provided by the church to challenge their exclusion. But they cannot seek redress in the civil courts—because they have consented, at least implicitly, to church governance, and because the state has no authority to interfere with the church's choice of its ministers.

"Freedom to select the clergy . . . [has] federal constitutional protection . . . against state interference." *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952). This protection stems from the Establishment Clause and the Free Exercise Clause, which together embody a principle of separation between the institution of church and the institution of state. The Religion Clauses were designed "to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other." *Lynch v. Donnelly*, 465 U.S. 668, 672 (1984) (quotation marks omitted). And the selection of a church's ministers lies squarely within the church's precinct, not the state's.

Even without the Religion Clauses, the Court's expressive association cases would support the right of a church to exclude a person from ministry. But the Religion Clauses do more than add weight to the right of any association to choose its members: they

erect a structural barrier against state interference with the selection of a church's ministers.

2. When a would-be minister sues a church complaining of exclusion from service in ministry, the protection of the First Amendment is unqualified and absolute. There is no occasion in such a case to "balance" the church's right against the asserted interest of the state. The state simply lacks the authority and competence to operate in the realm of choosing ministers for the church. The reason for the church's decision is beside the point. The point is that under our constitutional structure, *who* decides the question is determinative, not *what* is decided or *why*.

Even if one were to attempt to "balance" the church's right against the state's asserted interest in eliminating employment discrimination, the outcome would be the same in every case involving a minister. For no matter how "compelling" the state's interest might be in general, or in other contexts, the state has no legitimate interest, compelling or otherwise, in imposing its notions of equality or fairness on a church in the selection of its ministers. *See Boy Scouts v. Dale*, 530 U.S. 640, 657-69 (2000) (state's interest in eradicating discrimination does not justify intrusion on right of expressive association).

Keeping the state out of this distinct category of church decisions not only respects doctrinal principles, but avoids practical dangers. The "very process of inquiry" "may impinge on rights guaranteed by the Religions Clauses." *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979). In addition, civil courts are "incompetent judges" of the "matters of faith, discipline, and doctrine" that are often presented in such cases. *Watson v. Jones,* 80 U.S. (13 Wall.) 679, 732-34 (1872). Unpopular churches may be vulnerable to bias. The

risk of an erroneous decision can never be eliminated. And the prospect of intrusive and costly litigation would itself have a chilling effect on the decision of churches whether to remove someone from ministry.

3. There is uniform agreement among the Courts of Appeals that employment discrimination laws cannot be applied to challenge a church's decision to exclude a person from ministry. And the courts agree, as well, that for this purpose "ministry" is not limited to ordained clergy. Some courts, including the Court of Appeals in this case, have held that an employee is subject to the exception for ministers "if the employee's *primary* duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 778 (6th Cir. 2010) (citing *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007)) (emphasis added). But this case illustrates the flaw in the "primary duties" formulation: the Court of Appeals decided that a "called" teacher of religion, who also led students in prayer three times a day, could nonetheless challenge her termination because these duties were not "primary"—too many other "secular" duties were *also* part of her job. In *amici's* view, the church must have the right, free from state interference, to select those engaged in church governance, worship, teaching or other related functions, regardless of whether they have other duties as well.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS THE RIGHT OF RELIGIOUS INSTITUTIONS TO SELECT THEIR MINISTERS.

No First Amendment right is more critical to religious liberty than the right of churches freely to select their own ministers.[2] For religious organizations like *amici* and the tens of millions they represent, the issue is an existential one. "The relationship between an organized church and its ministers is its lifeblood." *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972), *cert. denied*, 409 U.S. 1050 (1972).

The First Amendment denies the state authority to review a church's decision to exclude a person from ministry. State regulation of the exquisitely sensitive process of selecting or dismissing ministers is nothing short of state control of religion. It is anathema to the American tradition of non-establishment of religion, free exercise of religion, and freedom of religious association.

A. The Religion Clauses Recognize a Zone of Church Autonomy.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

These first two clauses of the First Amendment recognize that there is a sphere of human activity involving religion that is beyond the power of government to regulate. Together, these clauses declare

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[2] In this brief, the term "church" is intended to refer to a broad class of houses of worship and religious institutions of varied faiths and denominations.

a foundational—even jurisdictional—limit on the power of government in the spiritual realm.

It has often been said that the Free Exercise Clause and the Establishment Clause complement each other. The Free Exercise Clause protects individuals and churches from direct interference in their individual and collective "exercise" of religion. The Establishment Clause guards against the twin evils of an established religion—coercion and discrimination from the perspective of those outside the established religion, intrusion and corruption from the perspective of those within it. *See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982) ("[T]he core rationale underlying the Establishment Clause is preventing 'a fusion of governmental and religious functions.'") (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963)). Both of these overlapping protections are implicated in this case. Together, they acknowledge and protect a zone of church affairs that the state is powerless to regulate—a zone that unquestionably includes the right of a church to select its ministers.

Thomas Jefferson wrote, and this Court has noted, that the Religion Clauses create a wall of separation between church and state. *Reynolds v. United States*, 98 U.S. 145, 164 (1879) (citing Jefferson's Letter to the Danbury Baptist Church). That metaphor, of course, is overly simplistic, *see Lynch v. Donnelly*, 465 U.S. 668, 678 (1984), and susceptible to manipulation and abuse, *see* Philip Hamburger, *Separation of Church and State* (2002).

But taken together, the Religion Clauses do embody a principle of separation between the institution of church and the institution of state that we in the United States hold dear. To Christians, it echoes the

command of Jesus to "Render to Caesar the things that are Caesar's and to God the things that are God's." *Mark* 12:7. In the words of this Court, the Religion Clauses are designed "to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other." *Lynch*, 465 U.S. at 672 (quotation marks omitted). "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference [and] it has secured religious liberty from the invasion of the civil authority." *Watson*, 80 U.S. at 730. "[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *Ill. ex. rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948).

To be sure, the line of demarcation between these separate spheres is not always clear. But in its simplest and most obvious application, the principle of separation, rightly understood, means this: there are some areas in which the church has no control—for example, whether a candidate is eligible for state office; and some areas in which the state has no control—for example, whether a person is eligible for church office.

The church, in other words, has the authority to conduct its internal affairs without state interference—not simply because there are certain limits on the exercise of powers properly within the state's authority, but because certain powers lie outside the state's authority entirely.

1. This Court Has Long Recognized the Right of Religious Institutions to Conduct Their Internal Affairs, Including the Selection of Ministers, Without State Interference.

In a well-established line of cases, this Court has acknowledged the "power [of churches] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116. First formulated in the context of church property disputes, *see Watson*, 80 U.S. at 679, the doctrine has been applied as well to disputes over who is entitled to serve as a chaplain, *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929), and a bishop, *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-09 (1976).

In *Watson*, this Court firmly rejected English common-law principles allowing civil courts to adjudicate church disputes. "[W]henever . . . questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried," the Court held, "the legal tribunals must accept such decisions as final and as binding on them, in their application to the case before them." 80 U.S. at 727. Believers have "[t]he right to organize voluntary religious associations" and to provide for "ecclesiastical government," the Court explained, and "[a]ll who unite themselves to such a body do so with an implied consent to this government." *Id.* at 728-29. Civil courts, the Court explained further, are "incompetent judges of matters of faith, discipline, and doctrine." *Id.* at 732-34. As a result, "the civil courts exercise no jurisdiction" over such disputes. *Id.*

In *Gonzalez*, the Court applied these principles in a case involving the appointment of clergy. A Roman Catholic Archbishop had refused to appoint the petitioner to a chaplaincy on the ground that he was unqualified. 280 U.S. at 12. In an opinion by Justice Brandeis, the Court rejected the civil court challenge and upheld the autonomy of the church "to determine what the essential qualifications of [clergy] are and whether the candidate possesses them." *Id.* at 16 (citing *Watson*, 80 U.S. at 727, 733).

Watson and *Gonzalez* were decided as a matter of general federal common law, before *Erie* and selective incorporation. But the principles of these cases were adopted and integrated fully into contemporary First Amendment doctrine in *Kedroff*, another case involving the appointment of clergy. There, the Court struck down a New York statute that had been invoked to resolve a dispute over who was entitled to serve as the Russian Orthodox Archbishop of New York and occupy St. Nicholas Cathedral. The "controversy," the Court explained, "is strictly a matter of ecclesiastical government, the power of the Supreme Church Authority of the Russian Orthodox Church to appoint the ruling hierarch of the archdiocese of North America." 344 U.S. at 115. And the statute that purported to transfer that power to governing bodies in America offended both Establishment Clause and Free Exercise Clause principles. The "transfer by statute of control over churches," the Court observed, "violates our rule of separation between church and state." *Id.* at 110. And "[l]egislation that regulates church administration, the operation of the churches, [and] the appointment of clergy . . . prohibits the free exercise of religion." *Id.* at 107-08.

Expanding upon the opinion in *Watson*, the Court stated:

> The opinion [in *Watson*] radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. *Freedom to select the clergy*, where no improper methods of choice are proven, we think, *must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.*

344 U.S. at 116 (emphases added) (footnote omitted); *see also Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190, 190 (1960) (per curiam) (extending *Kedroff* to include judicial action).

In *Milivojevich*, the Court rejected another attempt by the state to resolve a dispute over church leadership. 426 U.S. at 718-19. The Supreme Court of Illinois had invalidated the church's removal of a bishop as "arbitrary," because in the Court's view the removal proceedings had not been conducted in accordance with the church's constitution and penal code. *Id.* at 712-13. Quoting *Watson*, the Court reiterated that the First Amendment dictates that "civil courts exercise no jurisdiction" over "a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." 426 U.S. at 713-14. Disgruntled clergy or church members may not call on civil courts to review the decisions of church officials on such matters, no matter how arbitrary or irrational those decisions may appear:

> Indeed, it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith *whether or not rational or measurable by objective criteria*. Constitutional concepts of due process, involving secular notions of "fundamental fairness" or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance.

Id. at 714-15 (footnote omitted). In short, "the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government . . . ." *Id.* at 724.

Having applied this principle to invalidate a state statute and state judicial action interfering with the church's right to appoint its leadership, the Court in *Catholic Bishop*, 440 U.S. at 499 (1979), confronted an issue similar to the issue in this case: whether a federal employment statute can be applied in circumstances implicating the church's right to control its internal affairs. Like this case, that case involved teachers in a church-run school. But unlike this case, the teachers in *Catholic Bishop* included lay teachers of purely secular subjects. Still, the Court recognized that applying the National Labor Relations Act to the employment of teachers in church-run schools could violate the Religion Clauses.

> The resolution of [claims that certain decisions were religiously motivated], in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board [in adjudicat-

> ing such claims] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.

Id. at 502. To avoid these constitutional questions, the Court interpreted the National Labor Relations Act narrowly so as to preclude the exercise of jurisdiction.

Thus, in case after case, this Court has recognized the church's right to resolve matters of church governance, faith, and discipline on its own, without state interference. Nowhere does this principle of non-intervention apply more firmly than when the dispute involves the selection and retention of a church's ministers. When believers come together to form a church, they must have the freedom to decide for themselves who will be placed in positions of responsibility for the church's religious affairs. This is as fundamental as the notion that when the people come together to form a democracy, they, not the church, must have the ability to decide for themselves who will be placed in positions of responsibility for the affairs of the state.

2. *The Church Autonomy Cases Are Unaffected by* Employment Division v. Smith.

The cases recognizing this kind of structural barrier between church and state—a barrier that rests upon both the Establishment and Free Exercise Clauses—have been reaffirmed by this Court, even as it has limited the claims of individual citizens to exemption under the Free Exercise Clause alone from the demands of laws of general applicability. In *Employment Division v. Smith*, 494 U.S. 872 (1990), this Court held that the Free Exercise Clause does

not require exemptions for individuals from "valid and neutral law[s] of general applicability." *Id.* at 879 (quotation marks omitted). But at the same time, *Smith* explicitly cited with approval the Court's decisions in *Kedroff* and *Milivojevich*. *Id.* at 877.

Smith itself did not involve an internal dispute between church members or between a church and one of its members or clergy. It was a dispute between an individual and the state over the use of peyote in violation of state law. The case, therefore, did not present any issue of a *church's* institutional right to autonomy in the handling of its internal affairs. And recognizing the church's right to control its own *internal affairs*—at least its right to select its ministers—presents none of the threats to civil government that recognition of individual exemptions from laws of general applicability might present. Allowing each citizen, by virtue of his religious beliefs, "to become a law unto himself" would threaten "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct." *Id.* at 885 (quotation marks omitted). But the government's ability to prohibit socially harmful conduct, or to encourage socially beneficial conduct, is not undermined to any substantial degree, if at all, by recognizing a church's right to decide matters of internal governance, faith and discipline—in particular, its right to exclude someone from ministry.

Every court that has considered the issue presented in this case has recognized the distinction between an individual's desire, founded upon the Free Exercise Clause alone, to be excused from compliance with secular laws and a church's right, founded upon the Establishment and Free Exercise Clauses, to control its internal affairs and decide who may perform its religious functions. Every court, in

other words, has concluded that the church autonomy cases are unaffected by *Smith*.[3]

It is by now, therefore, well established that the church has the right to decide matters of internal governance, faith, and discipline by itself. Neutral, generally applicable laws may be applied to regulate the secular affairs of a church, but not those religious affairs that fall within the zone that is structurally removed from the state's proper authority. The church's selection of its ministers falls within that zone.

B. This Court's Freedom of Association Cases Reinforce the Right of Religious Institutions to Select Their Ministers.

The church's right to select its ministers, free from state interference or review, draws additional strength from the Court's freedom of association cases. Indeed, the earliest decisions described this structural freedom of the church as "[t]he right to organize voluntary *religious associations* to assist in the expression and dissemination of any religious doctrine." *Watson*, 80 U.S. at 728-29 (emphasis added).

This Court has held that the freedom of association protected by the First Amendment includes the right not to associate. It includes, in particular, the right of a group formed for expressive purposes to exclude those whose membership would undermine the group's message. In *Boy Scouts of America v. Dale*, 530 U.S.

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[3] *See, e.g.*, *EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 800 n.* (4th Cir. 2000); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1303-04 (11th Cir. 2000); *Combs v. Cent. Tex. Annual Conf. of United Methodist Church*, 173 F.3d 343, 349 (5th Cir. 1999); *EEOC v. Catholic Univ.*, 83 F.3d 455, 463 (D.C. Cir. 1996).

640, 646 (2000), this Court held that the Boy Scouts' "freedom of expressive association" prevented a state from enforcing its public accommodations law to require the Boy Scouts to accept a gay scoutmaster. Likewise, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995), the Court held unanimously that the organizers of a St. Patrick's Day parade had a First Amendment right to exclude a gay and lesbian group whose presence was thought to communicate a message about homosexual conduct that the organizers "did not like." *Id.* at 574.

Churches have an even stronger right than parade organizers and the Boy Scouts to join together to advance their religious message through their members and leaders: they enjoy the additional protection of the Religion Clauses. In *Smith* this Court noted that "it is easy to envision a case in which a challenge on freedom of association grounds would . . . be reinforced by Free Exercise Clause concerns." 494 U.S. at 882. This is such a case. If the Boy Scouts have the right to exclude a gay scoutmaster whose mere presence would undermine their message, and if the organizers of a St. Patrick's Day parade have a right to exclude those who would propound a message they do not like, then a church surely has a right to select those who are entrusted with the responsibility of preserving the church's message and transmitting it to the next generation. And as in those cases, general anti-discrimination legislation does not defeat that right. *See* Part III of this brief.

C. The Courts of Appeals Have Faithfully Applied This Court's Decisions to Protect the Right of Religious Institutions to Select Their Ministers.

Applying the principles established by this Court, the Courts of Appeals for every Circuit except the Federal Circuit, which has no occasion to consider such issues, have uniformly held that disputes between a church and its minister—or between a church and one who aspires to be its minister—are for the church to resolve, not the state. In particular, they all agree that employment discrimination laws cannot be invoked to challenge a church's selection of its ministers.[4]

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[4] *See, e.g.*, *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1577 (1st Cir. 1989); *Friedlander v. Port Jewish Ctr.*, 347 F App'x. 654, 655 (2d Cir. 2009), *cert. denied*, 130 S.Ct. 1714 (2010); *Rweyemamu v. Cote*, 520 F.3d 198, 205-08 (2d Cir. 2008); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 172 (2d Cir. 1993); *Hankins v. Lyght*, 441 F.3d 96, 117-18 (2d Cir. 2006); *Petruska v. Gannon Univ.*, 462 F.3d 294, 307 n.10 (3d Cir. 2006); *Rayburn v. Gen. Conf. of Seventh-day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985); *Shaliehsabou v. Hebrew Home, Inc.*, 363 F.3d 299, 309 (4th Cir. 2004); *Roman Catholic Diocese*, 213 F.3d at 802; *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1396 (4th Cir. 1999); *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999); *Combs*, 173 F.3d at 343; *EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 284 (5th Cir. 1981); *EEOC v. Miss. Coll.*, 626 F.2d 477 (5th Cir. 1980); *McClure*, 460 F.2d 553; *Hollins*, 474 F.3d at 226 (6th Cir. 2007); *Schleicher v. Salvation Army*, 518 F.3d 472, 474-76 (7th Cir. 2008); *Tomic v. Catholic Diocese*, 442 F.3d 1036, 1040 (7th Cir. 2006); *Alicea-Hernandez v. Catholic Bishop*, 320 F.3d 698, 704 (7th Cir. 2003); *Young v. N. Ill. Conf. of United Methodist Church*, 21 F.3d 184, 187 (7th Cir. 1994); *Scharon v. Saint Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360, 361-63 (8th Cir. 1991); *Alcazar v. Corp. of Catholic Archbishop*, 627 F.3d 1288 (9th Cir. 2010) (en banc); *Werft v. Desert Southwest Annual Conf.*, 377 F.3d 1099, 1103

The first court to reach this result explained the rationale succinctly: "The relationship between an organized church and its ministers is its lifeblood." *McClure*, 460 F.2d at 558. A church without the right to select its ministers is a church without the ability to govern itself, conduct its liturgy, control the content of its faith, or determine its message to the faithful and the world.

Subsequent courts have uniformly agreed that the selection of a church's ministers is a matter for the church, not the state, to decide—and that those who are excluded from the ministry, either by not being selected or by being removed, have no cognizable claim against the church under federal or state anti-discrimination laws. In short, the relationship between a church and its ministers, which is central to the life of the church, can be created and sustained only by the consent of the church, not by force of the state.

II. THE RIGHT OF RELIGIOUS INSTITUTIONS TO SELECT THEIR MINISTERS EXTENDS TO ALL WHO PERFORM RELIGIOUS FUNCTIONS.

A. The Right Is Not Limited to Ordained Clergy or to Those Who Exercise Purely or Primarily Religious Duties.

The courts are in agreement that the "ministerial exception" is not limited to—though it certainly

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(9th Cir. 2004); *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940 (9th Cir. 1999); *Skrzypczak v. Roman Catholic Diocese*, 611 F.3d 1238, 1243-45 (10th Cir. 2010); *Gellington*, 203 F.3d at 1299; *Catholic Univ.*, 83 F.3d at 461-65 (11th Cir. 2000); *Minker v. Balt. Annual Conf. of United Methodist Church*, 894 F.2d 1354, 1356-57 (D.C. Cir. 1990).

includes—ordained clergy. Thus, courts have refused to entertain discrimination claims by a non-ordained chaplain at a Catholic college,[5] a non-ordained associate of pastoral care at a Seventh-day Adventist Sabbath school,[6] a non-ordained pastoral resident at a religiously affiliated hospital,[7] a Catholic seminarian,[8] a director of pastoral studies for a diocese,[9] a Salvation Army "minister,"[10] a teacher of canon law at the Catholic University of America,[11] a press secretary of a religious organization,[12] a Kosher food supervisor,[13] a choir director,[14] and an organist.[15]

All courts agree that a clerical title is not required; rather, the question is to be determined by reference to religious functions. The courts have taken slightly different approaches to determining whether an employee's functions are religious or secular. But we think the correct approach is clear: if the employee's functions lie within any of the zones of activity that are protected from state interference, general employment laws cannot apply.

This Court has said that the First Amendment protects the right of churches "to decide for themselves,

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[5] *Petruska*, 462 F.3d at 307 n.10.

[6] *Rayburn*, 772 F.2d at 1168.

[7] *Hollins*, 474 F.3d at 226.

[8] *Alcazar*, 627 F.3d at 1288 (en banc).

[9] *Skrzypczak*, 611 F.3d at 1243-45.

[10] *Schleicher*, 518 F.3d at 474-76; *McClure*, 460 F.2d at 553.

[11] *Catholic Univ.*, 83 F.3d at 461-65.

[12] *Alicea-Hernandez*, 320 F.3d at 704.

[13] *Shaliehsabou*, 363 F.3d at 309.

[14] *Tomic*, 442 F.3d at 1040.

[15] *Starkman*, 198 F.3d at 173.

free from state interference, *matters of church government as well as those of faith and doctrine,*" and that church autonomy "applies with equal force to church disputes over *church polity* and *church administration.*" *Kedroff,* 344 U.S. at 116 (emphasis added); *see also Milivojevich*, 426 U.S. at 710. If the employee's function lies within one of these protected zones—if the function is one of religious worship, governance, or teaching—then the position can only be filled by decision of the church, not the state.

Several Circuits have held that an employee is subject to the exception for ministers "if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." *Hollins*, 474 F.3d at 226 (quotation marks omitted); *Petruska*, 462 F.3d at 306; *Scharon*, 929 F.2d at 361-63; *Catholic Univ.*, 83 F.3d at 461-65; *Rayburn*, 772 F.2d at 1169. There is no disagreement among the courts that these functions are ecclesiastical. But five Circuits have quite properly rejected the requirement that these be the employee's "primary" duties.

Whether or not one occupies a ministerial position does not depend on whether the person *also* performs some non-ministerial functions. Nor can it be made to depend upon a mathematical calculation of what percentage of time a person spends on activities deemed religious. The proper question is simply whether the position imposes responsibilities for church governance, worship, teaching, or other related functions. Governance includes the conduct of church affairs and the development and application of church law and discipline. Worship includes prayer and liturgical services. Teaching includes the

definition and transmission of the faith and its implications. If a position has responsibilities in any of these areas, the church alone must have the power to fill it, regardless of whether the position entails responsibilities in other areas as well.[16]

This approach is consistent with that of all the other Circuits—including the Fifth Circuit, which has looked to whether the employee is "engaged in activities traditionally considered ecclesiastical or religious," *Starkman*, 198 F.3d at 173, 176,[17] the Tenth Circuit, which applies the First Amendment exception when the employee's position is "important to the spiritual and pastoral mission of the church," *Skrzypczak*, 611 F.3d at 1243 (quotation marks omitted), and the other Circuits, which have applied the "ministerial exception" on a case-by-case basis.

B. Religious Institutions Have the Right to Choose Those Who Teach Religion and Lead Their Children in Prayer.

Certainly one critical function of any church is to define what it believes and to transmit those beliefs to the next generation. It is unthinkable that the state would have the authority to tell the church who should define its doctrine. It is equally unthinkable

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[16] Some courts also look to the nature of the claim. We are limiting our discussion, however, to the kind of claim asserted in this case—a claim of unlawful exclusion from a position with religious functions.

[17] The Fifth Circuit also looks to whether the person is hired based on religious criteria and whether the person is authorized to perform "ceremonies of the Church." *Starkman*, 198 F.3d at 176. But "probably [the] most important" criterion is that the person performs "religious duties." *Id* at 176-77.

that the state would have the authority to tell the church who may teach its religion to the young.

The First Amendment's protection of beliefs is absolute. *See Smith*, 485 U.S. at 670 n. 13 (citing *Sherbert v. Verner*, 374 U.S. 398, 403 (1963)). The state may not dictate what a church and its members may believe. The teaching of a church's faith—and, in particular, its transmission to the next generation—is essential to the preservation of the faith. So, too, is the leading of young children in prayer and worship. These activities, therefore, are no less deserving of absolute protection than the beliefs themselves. "Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction . . . ." *Larkin*, 459 U.S. at 126 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971)).

If the government can control *who* transmits religious beliefs to the young—through religious instruction and worship—then it can control *what* religious beliefs are transmitted and *how effectively* they are preserved. In short, deciding who will transmit the church's teachings to the young lies at the core of the church's mission and falls well within the area in which the church enjoys maximum protection from state interference. *See Catholic Bishop*, 440 U.S. at 501 ("[W]e have recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school."); *see also Minker*, 894 F.2d at 1356 ("[D]etermination of 'whose voice speaks for the church' is *per se* a religious matter.").

In this case, a formally commissioned Minister of Religion taught religion classes four days a week, led students in daily devotional exercises, led students in prayer three times a day, attended a chapel service

with her students each week, and led a school-wide chapel service twice a year. Whether or not she had other duties that were secular, these duties were religious under any test. That is enough to trigger the exception. For the church, not the state, must have the final say on whether she may perform these functions.

III. THE RIGHT OF RELIGIOUS INSTITUTIONS TO EXCLUDE A PERSON FROM MINISTRY IS ABSOLUTE.

This case presents the question whether the Hosanna-Tabor Evangelical Lutheran Church and School can be sanctioned for removing a person from her position in church ministry—whether, in other words, its decision *to exclude a person from ministry* is subject to challenge *by that person*. There is no injured third party before the court—only the church and a litigant who has given her "implied consent to [church] government, and [is] bound to submit to it." *Watson*, 80 U.S. at 728. The real parties in interest to the case are the parties to the church-minister relationship itself—a relationship that is protected by the First Amendment—and the dispute between them is whether that relationship can be imposed by the state upon an unwilling church.[18] In such a case, we submit, the protection of the First Amendment is unqualified and absolute. The aggrieved party in such a case may have resort to church law and remedies, but the meaning of the First Amendment is that resort may not be had to a civil court—because such disputes lie exclusively within the province of the church, not the state.

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[18] Whether and under what circumstances the church has a duty to third parties to protect them from harm caused by one of its employees is not before the Court.

A. "Balancing" the Right to Exclude a Person from Ministry Against State Interests Mistakes the Nature of the Right.

There is no occasion in a case such as this to "balance" the church's interest against the asserted interest of the state. The appropriate metaphor in a case like this is, indeed, a wall, not a scale. The nature of the right, after all, is one of autonomy—the right of the church to decide for itself who it wants to serve as a minister. It may make that decision for doctrinal reasons that are contrary to prevailing secular values; it may make that decision for reasons that appear "arbitrary" or inconsistent with "due process" and "secular notions of 'fundamental fairness'" or in furtherance of what secular institutions deem "impermissible objectives." *Milivojevich*, 426 U.S. at 714-15. The reason for the decision is beside the point. The point is that under our constitutional structure *who* decides the question is more important than *what* is decided or *why*. For a civil court, therefore, to second-guess the church's decision to exclude a person from *its* ministry is indefensible, regardless of how offensive the church's decision might appear to civil authorities.

The point can be seen most clearly in a case in which the church's decision is undeniably based on an articulated religious reason. Consider this case:

- A woman who aspires to the priesthood sues the Catholic Church for sex discrimination when she is denied admission to a Catholic seminary. "Balancing" the secular interest in eliminating sex discrimination against the church's religious freedom is incoherent. It would invite a civil court to weigh the

> importance of the church doctrine that limits the priesthood to men on the same scale with the state's general interest in assuring equal employment opportunities for women, when the resolution to the case lies in the recognition that the church, not the state, has the right to decide.

The point—that the church has the right of decision—is also obvious when its decision is based on disputed religious teachings:

- An Episcopal priest in a same-sex relationship is denied a position as pastor of a local Church, because the members of the local governing body believe that relationship to be contrary to Biblical teaching. The priest sues for discrimination on the grounds of sexual orientation, pointing out that the local bishop had chosen to allow same-sex unions. Any difference in interpretation of Scripture should obviously be left to the church to resolve. As between the church and the state, the right of decision remains with the church.

The church's right to decide for itself who may serve as its minister applies with equal force when there is a dispute over whether a stated religious reason was a pretext, and even when the reason is not explicitly religious at all—because the minister's function is itself religious, even if the reason for excluding someone from that function is not.[19]

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[19] *See, e.g.*, *Roman Catholic Diocese*, 213 F.3d at 801 ("The exception precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decision. The church need not, for example, proffer any religious justification for its decision, for the Free Exercise Clause 'protects the act of a decision rather than a motivation behind it.'") (citation omitted);

- A male religion teacher in a Catholic elementary school is fired on the stated ground that he is living with his girlfriend in contravention of church teaching. He alleges that this was a pretext for unlawful sex discrimination by a principal who simply preferred female teachers.

- A church pastor removed from his position on grounds of general ineffectiveness claims that the asserted grounds were but a pretext for discrimination on the basis of race, which is itself condemned by the church.

In resolving the question of pretext in the first of these two cases, the court would presumably have to assess not only what the church's teaching is on premarital sex, but also how important the teacher's adherence to that teaching is to the accomplishment of the church's educational mission, how consistent the local church school had been in sanctioning teachers for non-compliance, and, indeed, whether living together without proof of illicit sexual activity presents an issue of morality or scandal. This Court, however, has "warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Smith*, 494 U.S. at 887 (quoting *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989)); *see also Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*,

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Alicea-Hernandez, 320 F.3d at 703 ("It is . . . not our role to determine whether the Church had a secular or religious reason for the alleged mistreatment . . . . [T]he only question is that of the appropriate characterization of her position."); *Bell v. Presbyterian Church*, 126 F.3d 328, 332-33 (4th Cir. 1997) (termination of minister allegedly for fiscal reasons not subject to civil court review).

393 U.S. 440, 449, 451 (1969) (noting that courts are "forbidden" from "interpreting and weighing church doctrine," and that when courts intrude into ecclesiastical matters, "the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern").

In the second case, the court would be required to assess the pastor's religious duties, how they should be performed, and how effectively he performed them: Were his sermons inspiring? How well did he lead the flock? One can readily see that these inquiries would themselves be intrusive. As in *Catholic Bishop*, "[i]t is not only the conclusions that may be reached . . . which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." 440 U.S. at 502.

Even apart from the intrusiveness of the inquiry, there are serious questions whether a civil court would be competent to assess church teachings or the effectiveness of a pastor's leadership. As this Court has stated, civil courts are "incompetent judges of matters of faith, discipline, and doctrine." *Watson*, 80 U.S. at 733-34. And putting competence aside, imposition of a civil court's judgment would be harmful to the church no matter how sound the judgment may be. If a court were to determine that the church had been inconsistent in enforcing a particular teaching in a particular context, that would undermine the church's ability to safeguard and control its teaching.

The profound risk is that the church's very "process of self-definition would be shaped in part by the prospects of litigation." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 336 (1987).

The danger to the church is compounded by the fact that a jury deciding these questions might be influenced by bias. Unpopular churches are particularly vulnerable to this risk. *Cf. Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011).

Even assuming competence and the absence of bias, the risk of an erroneous decision can never be eliminated: juries will sometimes be wrong, especially if they need only decide a case by a preponderance of the evidence. And the prospect of intrusive and costly litigation that distracts from the church's mission, as well as the possibility of losing, would be strong deterrents for churches deciding whether to remove someone from ministry.

As a practical matter, therefore, allowing these cases to be litigated in civil courts would severely inhibit churches in making decisions about who may serve in ministry. But even if one discounts the intrusive nature of the inquiry, the questions of competence and bias, and the possibility of error, the fact remains that the decision to be made is whether a person may serve in a position with religious duties—and that decision under our constitutional scheme must be reserved to the church. In ordinary civil matters, we accept the burdens of litigation and the possibility of human error because we have no real choice—and because in the context of civil disputes the Constitution places a value on trial by jury. In cases involving constitutional rights, we employ additional safeguards like independent review

to minimize the risk of bias and error, while still recognizing the value of trial by jury in assessing credibility and making basic factual determinations. But in cases involving whether a person may serve as a minister of a church, the Constitution places the decision-making authority in the church itself.

For this reason, the church's absolute right to decide who may serve as a minister remains inviolable even when it decides to exclude someone for a concededly improper reason that finds no apparent justification in any church teaching or practice—or, indeed, when the church has purportedly acted inconsistently with its underlying beliefs. In such a case, the person wrongfully denied a ministerial position must seek relief and reform within the church that she seeks to serve, not from the state. For the state can provide neither relief nor reform without trespassing on the overriding principle that internal church affairs are to be governed by the church itself.

B. In Any Event, the State Categorically Lacks Any Interest, "Compelling" or Otherwise, in Gainsaying the Decision of a Religious Institution to Exclude a Person from Ministry.

Even were one to apply a "compelling state interest" test to cases like this, the outcome would always be the same. The state has no legitimate interest, compelling or otherwise, in trespassing on a church's right to select its ministers.

To the contrary, the state itself has a particular interest in vindicating the constitutional principle at stake in cases such as this, because the principle exists for the protection of the state as well as the church. It protects the state against the imposition of religious tests for state office, no less than it protects

the church from the imposition of secular tests for ministerial positions. It "prevent[s], as far as possible, the intrusion of either [the church or the state] into the precincts of the other." *Lynch*, 465 U.S. at 672. In this case, then, the state's interest is aligned with the church's in maintaining the dividing line between church authority and state authority. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001) ("We have said that a state interest in avoiding an Establishment Clause violation 'may be characterized as compelling . . . .'") (quoting *Widmar v. Vincent*, 454 U.S. 263, 271 (1981)).

The state's general interest in eliminating employment discrimination would not satisfy the compelling state interest test in any event. As this Court emphasized in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430 (2006), strict scrutiny requires a "more focused" inquiry. In cases applying the compelling interest test, "this Court [has] looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 431. The compelling interest test "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'"—here, that there is a compelling interest in applying the ADA to this church's employment of this "called" teacher of religion. *Id.* at 430.[20]

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[20] The Court was quoting the Religious Freedom Restoration Act, but it made clear that that Act "expressly adopted the compelling interest test 'as set forth in *Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972),'" two

"'Context matters' in applying the compelling interest test." *Id.* (quoting *Grutter* v. *Bollinger*, 539 U.S. 306, 327 (2003)). The context here is that of a church seeking to determine who may serve as its minister, and that context makes all the difference. The government has no legitimate interest—and certainly no compelling one—in second-guessing a church's exclusion of a person from ministry. The government has an interest in enforcing principles of equality *in secular employment*, but it has no comparable interest in imposing its notions of equality upon a church *in the selection of its ministers*.

The importance of context in applying anti-discrimination laws was explicitly noted in this Court's opinion in *Dale*. There the Court explained that in its prior associational freedom cases, it had "recognized . . . that States have a compelling interest [in general] in eliminating discrimination against women in public accommodations." 530 U.S. at 657. But that did not resolve the question in those cases. Rather, the Court noted in *Dale*, "after finding a compelling state interest, the Court [in those prior cases] went on to examine whether or not the application of the state law would impose any 'serious burden' on the organization's rights of expressive association." *Id.* at 658-59. In the prior cases cited, the Court explained, it had found no serious burden. *Id.* But in *Dale* itself, there was such a burden, and the Court held unequivocally that the state's general interest in eliminating discrimination did not justify its enforcement against the Boy Scouts:

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cases that applied the compelling interest test to Free Exercise claims. *Gonzales*, 546 U.S. at 431 (citation omitted).

> The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association. That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law.

Id. at 659.

To the extent that courts applying the "ministerial exception" have engaged in any balancing at all, they have uniformly reached a similar conclusion—that "the Government's interest in eliminating employment discrimination is insufficient to overcome a religious institution's interest in being able to employ the ministers of its choice." *Catholic Univ.*, 83 F.3d at 467-68; *accord Minker*, 894 F.2d at 1357 ("certain civil rights protected in secular settings are not sufficiently compelling to overcome certain religious interests"); *Rayburn*, 772 F.2d at 1169 ("While an unfettered church choice may create minimal infidelity to the objectives of Title VII, it provides maximum protection of the First Amendment right to the free exercise of religious beliefs."); *Powell v. Stafford*, 859 F. Supp. 1343, 1347 (D. Colo. 1994) ("[A]lthough the government has an interest in eradicating age discrimination, it is not compelling in light of the fundamental right of a church to determine who may be trusted with the spiritual function of teaching its ecclesiastical doctrine under the free exercise clause.").[21]

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[21] *See* Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 Pepp. L. Rev. 641, 653 (2001) ("When the state's position on the matter can prevail only by

In short, however weighty the state's interest might be in eliminating discrimination or retaliation when it comes to employment of workers in the secular arena, the state never has a compelling interest in sanctioning a church, under the rubric of "discrimination" or otherwise, for excluding a person from ministry.

CONCLUSION

For the foregoing reasons, the judgment should be reversed.

Respectfully submitted,

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significantly undercutting a . . . group's ability to carry out its expressive or otherwise constitutionally protected mission, one cannot automatically assume that the state's condemnation of the contested practice as 'discrimination' furnishes a compelling justification sufficient to negate the liberty of the . . . group.").

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

JUN 20 2011
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No. 10-553

IN THE

Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND CHERYL PERICH,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF THE COUNCIL FOR CHRISTIAN COLLEGES AND UNIVERSITIES AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

The federal courts of appeals have long recognized the "ministerial exception," a First Amendment doctrine that bars most employment-related lawsuits brought against religious organizations by employees performing religious functions. The circuits are in complete agreement about the core applications of this doctrine to pastors, priests, and rabbis. But they are evenly divided over the boundaries of the ministerial exception when applied to other employees. The question presented is:

Whether the ministerial exception applies to a teacher at a religious elementary school who teaches the full secular curriculum, but also teaches daily religion classes, is a commissioned minister, and regularly leads students in prayer and worship.

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BRIEF OF THE COUNCIL FOR CHRISTIAN COLLEGES AND UNIVERSITIES AS *AMICUS CURIAE* SUPPORTING PETITIONERS

Amicus curiae, the CCCU, respectfully submits that the judgment of the Sixth Circuit should be reversed.[1]

INTEREST OF *AMICUS CURIAE*

The Council for Christian Colleges and Universities ("CCCU") is an international association of intentionally Christian colleges and universities. The CCCU exists "[t]o advance the cause of Christ-centered higher education and to help member institutions transform lives by faithfully relating all areas of scholarship and service to biblical truth." CCCU, *About CCCU*, http://www.cccu.org/about. Headquartered in Washington, D.C., the CCCU has 111 members and 28 affiliates in North America, all of which are fully accredited colleges and universities with curricula rooted in the arts and sciences. The CCCU's members have over 300,000 students enrolled and over 1.5 million alumni. A list of the CCCU's member and affiliate institutions is provided in Appendix A.

The CCCU's member institutions are committed to applying Christian doctrine and belief to all areas

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[1] Pursuant to this Court's Rule 37.6, the CCCU states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the CCCU, its counsel, and its members made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters of consent are on file with the Clerk's Office.

of human endeavor. The Sixth Circuit's decision in this case has significant implications for religious employment decisions by the CCCU's members. Specifically, these institutions reject as contrary to their core religious beliefs the Sixth Circuit's view that there is a distinction between sacred subjects and secular subjects. The Sixth Circuit's decision invites courts to impose their own view as to whether a religious institution's employee's duties are "religious." Such questions are the very type of entanglement with religion that the ministerial exception was created to avoid.

STATEMENT

Because the very mission of the CCCU's members is to integrate faith into a variety of subjects and to encourage their students to understand how a Christian worldview illuminates all areas of learning and life, the Court's decision regarding the ministerial exception will directly affect how and the extent to which these religious institutions are able to pursue their missions. Accordingly, the CCCU submits this brief to provide the Court with a better understanding of the missions of colleges and university like the CCCU's member institutions, of how they strive to integrate faith into subjects ranging from mathematics to literature to business, and of how the Court's decision in this case will affect their ability to pursue this mission.

These institutions have a real commitment to integrating faith into the subjects they teach; the concept of faith integration is not a subterfuge to take advantage of the ministerial exception. To the contrary, it is an integral part of the mission of many religious higher-education institutions and has been the subject of significant thought and study.

Likewise, these institutions do not seek to apply the ministerial exception to shield arbitrary and discriminatory employment decisions. Religious colleges and universities have adopted grievance and appeal procedures to ensure that employment decisions related to faculty are fair and just.

This is not to suggest that the ministerial exception should or does apply to all faculty at all religious colleges or universities. Nor does the CCCU urge the Court to address the application of the ministerial exception in the context of higher education. Instead, the CCCU merely provides this background to urge this Court to adopt a test for the ministerial exception that takes into account the stated mission of the religious institution when deciding whether its employees are important to the institution's religious mission or otherwise fall within the scope of the ministerial exception.

SUMMARY OF ARGUMENT

The very reason that many religious colleges and universities exist is to propagate their faith through instruction that demonstrates how religious faith is exercised in all subject matters. This instruction is frequently provided in a far more nuanced and comprehensive fashion than just engaging in group prayer, exhorting students to personal piety, and singing spiritual songs. Instead, faculty are required to integrate faith into the subjects that they teach. Consequently, an approach to the ministerial exception that simply measures the quantity of time a person spends on prayer, Bible reading, and the like fundamentally misperceives the role of faith in education at religious institutions of higher education.

As the CCCU's member institutions demonstrate, the requirement that faith be integrated into

all subject matters is not a ploy to avoid the jurisdiction of the courts, but a genuine outworking of religious colleges' and universities' religious mission. These same institutions adopt internal grievance and dispute-resolution processes to ensure that employment decisions regarding faculty are made for just and legitimate reasons. Thus, ministerial employees at religious institutions of higher education routinely retain the ability to have employment decisions reviewed even if they cannot seek recourse to the courts.

ARGUMENT

I. Religious higher-education institutions exist to help their students integrate their faith into all areas of their lives, including "secular" subjects.

Just as this Court recognized that "'the *raison d'être* of parochial schools is the propagation of a religious faith,'" *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 503 (1979), many religious colleges and universities view their mission to be propagating faith by integrating it into the subjects they teach, including subjects sometimes deemed "secular." Numerous religious universities and college spell this faith-integration goal out in their mission statements.

For example, Union University, located in Tennessee, states that its purpose as an institution includes seeking "to establish all aspects of life and learning on the Word of God, leading to a firm commitment to Christ and His Kingdom." Union University, *Statement of Purpose*, http://www.uu.edu/about/statement.cfm. "This commitment calls for all faculty and staff to integrate Christian faith in all learning and doing," the university explains, "based

on the supposition that all truth is God's truth and that there is no contradiction between God's truth made known to us in Holy Scripture and that which is revealed to us through creation and natural revelation." *Id.*

Kuyper College, in Michigan, shares a similar focus. Kuyper College uses "the integration of a high-quality academic curriculum and a Reformed worldview" to "provide students with the opportunity to see, understand, and live all of life through the lens of the Bible." Kuyper College, *About Kuyper*, http://www.kuyper.edu/About/main.aspx. Kuyper's curriculum is intended to awaken students to the need for possessing a solid, biblical worldview that gives every academic discipline significance as a tool for evangelism and discipleship, and for bringing social justice in Jesus' name. Kuyper College, *Integrating Faith and Learning*, http://www.kuyper.edu/Academics/integrating_faith.aspx.

To give yet another example, the purpose of Calvin College, in Michigan, is to "offer education that is shaped by Christian faith, thought, and practice." Calvin College, *Our Mission*, http://www.calvin.edu/about/mission.html. In the view of Calvin College, its "calling in Christian college education" is that "in an academic setting, with the peculiar tools, perspectives, and resources of academe, we have to equip ourselves with the knowledge, the skills, and the attitudes that can be thrown into the struggle for shalom, the battle for universal wholeness and delight." Calvin College, *Our Calling*, http://www.calvin.edu/about/shalom.html. Calvin College explains how this calling plays out in an academic setting:

> So in a Christ-centered college we learn what we can about creation itself. We learn the

> functions and beauty of numbers and sets of numbers; we learn the wonder of cells and cell division. . . . We study and teach history to develop judgement . . . [and] to understand from a biblical point of view what is comic and what is tragic in a fallen world, and how strikingly often they combine. . . . We learn in literature classes the best that's been thought and said. Reading fiction, for instance, is an excellent way to learn something about human character. We learn (as we would by reading the biblical account of King David) how possible it is for great goodness and great wickedness to cohabit in a single person. [*Id.*]

Numerous other religious colleges and universities share similar visions, including:

- Belhaven University (Mississippi): "Belhaven University prepares students academically and spiritually to serve Christ Jesus in their careers, in human relationships, and in the world of ideas." Accordingly, "[e]ach academic department . . . clarifies the implications of biblical truth for its discipline." Belhaven University, *Vision & Mission of Belhaven University*, http://www.belhaven.edu/belhaven/mission.htm.

- Erskine College (South Carolina): "The mission of Erskine College is to equip students to flourish by providing an excellent liberal arts education in a Christ-centered environment where learning and biblical truth are integrated to develop the whole person." Erskine College, *Erksine College Mission Statement*, http://www.erskine.edu/about-erskine/mission statement.shtml.

- Cedarville University (Ohio): "[T]he University seeks . . . [t]o undergird the student in the fundamentals of the Christian faith and to stimulate each student to evaluate knowledge in the light of scriptural truth." Cedarville University, *Mission and Objectives*, http://www.cedarville.edu/About/Mission.aspx.
- Dordt College (Iowa): "[T]he mission of Dordt College is to equip students, alumni, and the broader community to work effectively toward Christ-centered renewal in all aspects of contemporary life." Dordt College, *Our Mission*, http://www.dordt.edu/about/our_mission/.
- Biola University (California): Biola pursues "Christ-centered and Spirit-led education, scholarship and service that is grounded in Scripture and challenges our community to seek and integrate biblical principles into our fields of study." Biola University, *Mission, Vision & Values*, http://www.biola.edu/about/mission/.
- Gordon College (Massachusetts): "Gordon students are taught that a Christian education has implications for every aspect of their lives." Gordon College, *Community at Gordon*, http://www.gordon.edu/page.cfm?iPageID=382&iCategoryID=31&About&Community_At_Gordon.
- Seaver College, Pepperdine University (California): "Seaver College is a Christian College because of its Christian faculty, students, and commitment to the integration of faith and learning." Pepperdine University, *Prospective Students*, http://www.pepperdine.edu/prospective-students/.

These and similar universities do not merely pay lip service to the goal of integrating faith across a variety of subjects; they follow through on that goal.

Regent University, in Virginia, for example, has a policy requiring prospective faculty to demonstrate they are "proficient in the integration of faith and learning" and offers that "[a] representative from the School of Divinity may be consulted in this process." Regent University, *Faculty & Academic Policy Handbook*, http://www.regent.edu/academics/academic_affairs/faculty_handbook.cfm#worldview. If the prospective faculty member is not proficient, he must develop "a plan to achieve proficiency within a three-year period," and that plan "shall include activities such as . . . [c]ompleting a prescribed reading list on doctrine, hermeneutics and integration." *Id.* At Regent, annual performance reviews require current faculty to submit documentation that demonstrates proficiency, such as "a paper of an integrative nature" or "course materials that demonstrate appropriate integrative skills and understanding." *Id.*

Similarly, Nyack College, in New York, has "a policy of requiring a faith/learning integration paper of all faculty seeking tenure." Nyack College, *Bibliography for the Integration of Faith and Learning*, http://www.nyackcollege.edu/library/onlinefl/onlineftoc.htm.

Pepperdine University has a Center for Faith and Learning that "seeks to enhance the connections between classroom teaching, scholarship, and Christian faith and practice." Pepperdine University, *Center for Faith and Learning*, http://www.pepperdine.edu/centerforfaithand-learning/. In fact, a number of religious colleges and universities have

similar centers devoted to faith integration. See, for example:

- Whitworth University (Washington), *Center for Christian Faith & Learning*, http://www.whitworth.edu/FaithCenter/About.htm;
- Waynesburg University (Pennsylvania), *Center for Faith and Learning*, http://www.waynesburg.edu/index.php?q=node/818; and
- Regent University (Virginia), *Center for Teaching & Learning*, http://www.regent.edu/admin/ctl/consult/faith.cfm.

As the foregoing suggests, the question how to integrate faith into subjects that might appear "secular" to a court has been a subject of significant thought and study. Scholars have written books discussing how different areas of learning relate to or are illuminated by religious beliefs. Here, for example, is a short list of books that examine how revealed truth (i.e., Scripture) can relate to or help explain discovered truth in specific academic disciplines:

- Brabenac, R.L. *A Christian Perspective on the Foundations of Mathematics.* Wheaton: Wheaton College, 1977.
- McIntire, C.T., ed. *God, History and Historians: Modern Christian Views of History.* New York: Oxford University Press, 1977.
- Moreland, J.P. *Christianity and the Nature of Science: A Philosophical Investigation.* Grand Rapids, MI: Baker Book House Co., 1989.

- Halterman, James. *The Clashing Worlds of Economics and Faith.* Scottsdale, PA: Herald, 1995.
- Petersen, Michael. *With All Your Mind: A Christian Philosophy of Education.* Notre Dame, IN: Univ. of Notre Dame Press, 2001.
- Jeeves, Malcom A., and David Myers. *Psychology through the Eyes of Faith.* San Francisco: Harper & Row, 1989.[2]
- George, Robert P. *The Clash of Orthodoxies: Law, Religion, and Morality in Crisis.* Wilmington: ISI, 2001.
- Kuyper, Abraham. 1898 Stone Lectures, Princeton University. *In Creating a Christian Worldview.* Compiled by Peter S. Heslam. Grand Rapids: Eerdmans, 1998.
- Grunlan, Stephen, and Marvin Mayers. *Cultural Anthopology: A Christian Perspective.* Grand Rapids: Zondervan, 1988.

This is just a short list to highlight the breadth of scholarship that exists on integrating faith. Many religious colleges and universities publish more complete bibliographies to aid their students and faculty in their quest to understand how particular subjects inform and are informed by religious beliefs and insights. *E.g.*, David S. Dockery, *A Bibliography for the Integration of Faith and Learning* (Fall 2007),

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[2] The CCCU sponsored a "Through the Eyes of Faith" series, published by Harper Collins, that addresses a variety of academic disciplines, including mathematics, business, music, biology, literature, sociology, and history.

http://www.uu.edu/dockery/FaithLearnBooklet_Fa07.pdf; Waynesburg University, *Bibliographies by Discipline on the Integration of Faith and Learning*, http://www.waynesburg.edu/depts/jthompso/integ.htm; International Ass'n of Baptist Colleges & Universities, *Faith & Learning Bibliography*, http://www.baptistschools.org/bc/FL_Bibliography.html; Institute of Christian Studies, *Faith & Learning Network*, http://www.icscanada.edu/library/ fln.shtml #bibliography (hosting a bibliographic database).

Some areas of study may appear to be harder to integrate with faith than others. But as an assistant professor at Cedarville University has explained, even mathematics is influenced by the worldview of the mathematician:

> Let me give an example. How does a mathematician view his latest result? When he proves a theorem, is he creating this result or discovering it? There have been many letters published in mathematics journals in the last few years concerning this. Most humanists seem to believe that they are creating new identities which did not exist before they "created" them. Most theists, on the other hand, view their work as discoveries of already existent, but previously unseen, mathematical truths. [James Sellers, *Biblical Integration in Mathematics: Why and How?*, http://www.iclnet.org/pub/facdialogue/24/sellers24.]

Mathematics, for example, can be used to illustrate the "distinction between absolute truth and truth based on axioms." *Id.* "All mathematics is based on a set of axioms, whether it be Peano's [Postulates] or Euclid's for Euclidean geometry." *Id.* If "the axioms are changed, then the 'mathematical truths' based on

the axioms can also change." *Id.* (giving the example that the truth of the equation 2 + 3 = 5 depends on whether it is in a base-10 system or a nondecimal system, such as base-4). This distinction illustrates that "[a]lthough mathematics is one of the purest of sciences, it is based on an axiom system and, therefore, does not generate absolute truths." *Id.*

As these examples show, the Sixth Circuit's approach, which would assume a professor's primary duties are secular if the professor teaches math or English, rather than theology, would ignore, to paraphrase this Court, the "critical and unique role of the [professor] in fulfilling the mission of a church-operated [college]." *NLRB*, 440 U.S. at 501. The *raison d'être* of these institutions is to teach their students a comprehensive worldview and to show them how their faith can inform all of these areas of study, and courts should not "minimize . . . religion by calling a faith-centered social studies class, for example, 'secular' because it does not involve worship and prayer." *Coulee Catholic Schs.* v. *Labor & Indus. Review Comm'n, Dept. of Workforce Dev.*, 320 Wis. 2d 275, 304 (2009). Accord, *Adams* v. *Indiana Wesleyan Univ.*, 3:09-CV-468, 2010 WL 2803077 (N.D. Ind. July 15, 2010) (holding that the nature and character of social work professor's duties were ministerial in nature so as to invoke the ministerial exception).

Further, this Court has also recognized that "[t]he line" between secular and religious activities "is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S.

327, 336 (1987). Given this concern, "[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission." *Id.* That is one of the reasons the circuits have adopted the ministerial exception. In the context of higher education, the CCCU's members (and similarly devoted colleges and universities) understand their religious mission to be to teach their faith, not just in theology classes, but in history classes, in English classes, in chemistry classes, and in mathematics classes. In other words, they believe that the subjects they teach are not secular.

Therefore, for faith-integrating religious educational institutions that view the duty of their professors to be identifying for students the integration of faith in each course's subject matter, the state should not, through its courts, be in the business of telling these religious institutions that this duty is not important enough to the mission of the religious organization to make the professor a ministerial employee. *New York* v. *Cathedral Acad.*, 434 U.S. 125, 133 (1977) ("The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment."). Instead, courts should take into account the stated missions of the religious organizations, particularly in the educational context. If the institution's mission is to integrate faith into all subjects, and it affirmatively requires its teachers to do so, then those teachers will qualify for the ministerial exception. This approach will avoid the entanglement that would result if the court had to decide if a history class taught at a religious college was a secular activity. *NLRB*, 440 U.S. at 502 (recognizing that "the very process of inquiry" for claims against "religious

schools" "may impinge on rights guaranteed by the Religion Clauses"). In the words of the D.C. Circuit, "trolling through the beliefs of [schools], making determinations about [their] religious mission, and that mission's centrality to the 'primary purpose' of the [school]" is "just 'the sort of intrusive inquiry that [*NLRB* v.] *Catholic Bishop* sought to avoid.'" *Carroll Coll., Inc.* v. *NLRB*, 558 F.3d 568, 572 (D.C. Cir. 2009) (explaining that courts should look at a university's "course catalogue, mission statement, student bulletin, and other public documents," rather than inquiring "into the content of the school's religious beliefs" or expressing "skepticism whether those beliefs were followed"). Determining whether a particular class was a secular activity, after all, would require the court to examine the curriculum, to investigate what the professor discussed in class, to assess whether the professor's instruction was consistent with the intent of her employer, and to impose its view as to whether the class was primarily secular or religious.

The Sixth Circuit's decision also highlights the hazards of applying a quantitative approach to determining the employee's importance to the institution's religious mission. At the college level, even a professor who devotes 100% of his time to teaching mathematics or theater might rightly be viewed as having a ministerial role, if the college's mission statement or his job description tasks him with spreading the faith or with educating students in how that faith applies in the context of those particular subjects. Indeed, the assumption that the importance of the task is shown by the amount of time spent on the task bears little connection with reality, even in a secular context. Under this quantitative approach, one would conclude that the primary duty

of a soldier is to train for war, not to fight in war, given that soldiers typically spend far more time training than they do in actual combat. *But see* U.S. Army, *Organization*, http://www.army.mil/info/organization/ ("The Army's mission is to fight and win our Nation's wars.") Accordingly, this Court should reject the theory that an employee's importance or religious significance can be evaluated simply by calculating, as the Sixth Circuit did, the amount of time the employee spends on a given subject.

This is not to say that all faculty at every college or university with a religious affiliation will qualify as ministerial employees. Many religious colleges view their mission differently and do not seek to integrate faith in such a comprehensive way. Accordingly, the duties of faculty at these institutions may not be ministerial in nature. This Court should therefore develop a test for the ministerial exception that takes into account the stated mission of the religious institution when deciding whether its faculty fall within the scope of the ministerial exception.

II. Ministerial employees at religious institutions of higher education have access to internal grievance and appeal mechanisms outside the courts.

Although the application of the ministerial exception prevents judicial review of employment decisions affecting ministerial employees, this does not mean that these employment decisions cannot be reviewed. Cf., *AT&T Mobility LLC* v. *Concepcion*, --- U.S. ---, 131 S.Ct. 1740, 1749 (2011) (acknowledging parties' discretion in designing arbitration processes). Christian colleges and universities have adopted grievance and appeal processes for faculty who disagree with employment decisions.

These policies are often spelled out in faculty handbooks and typically involve appealing decisions to the institution's president or governing board. Consider, for example, Calvin College's grievance and appeal procedures: A faculty member aggrieved by an employment decision (including denial of tenure) may seek reconsideration from the body making the decision and appeal the decision to the college's president or the executive committee of the board of trustees (or both). Calvin College, *Handbook for Teaching Faculty*, §§ 3.7.6.2.3, 6.1 (procedures for addressing allegations of misconduct), 6.5 (antidiscrimination policy), http://www.calvin.edu/admin/provost/handbook/. *Accord*, Dordt College, *Faculty Handbook*, §§ 4.4.6, 4.4.9.3, 7.5, http://www.dordt.edu/publications/faculty_handbook/faculty_handbook.pdf.; Gordon College, Administrative/Faculty Handbook, §§ 4.8.3, 4.9.2, http://www.gordon.edu/download/pages/Admin%20Faculty%20Handbook%20-%20updated%20Feb%202011%20(2)1.pdf. Calvin College guarantees to its faculty the right to have complaints giving rise to possible termination made in writing, to be represented at the hearing by a colleague, and the right to have witnesses examined in the presence of the accused. Calvin College, *Handbook for Teaching Faculty*, § 3.10.3.2; *accord*, Nyack College, *Faculty Handbook*, § 6.6 (including right to have a gender-diverse hearing panel for all grievances involving gender discrimination), http://www.nyack.edu/files/NYACKFacultyHandbook2009_10.pdf.

The CCCU presents this information simply to show that the ministerial exception does not deprive ministerial employees of all review of employment decisions. Ministerial employees and religious organizations have and will continue to provide griev-

ance and appeal procedures to ensure that employment decisions are fair and just.

CONCLUSION

In the end, it is the religious institution that must decide how to fulfill its spiritual mission, and to do that, it must define the duties of its employees. When an institution assigns its teachers the task of integrating faith into all subjects and holds them accountable for that task, those teachers are central to the institution's religious mission and therefore fall within the ministerial exception. Courts are ill-equipped and without authority to second-guess those decisions, particularly by relying on the amount of time the employee spends on tasks the court considers "secular" but the religious institution considers spiritual. Further, the entire undertaking of determining whether duties are spiritual or secular is fraught with risks of unnecessary entanglement in the exercise of religion. For these reasons, the CCCU respectfully requests that this Court reverse the decision of the Sixth Circuit.

Respectfully submitted.

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June 20, 2011

APPENDIX A: CCCU MEMBERS AND U.S. AFFILIATES

CCCU Members

1. Abilene Christian University, Abilene, TX
2. Anderson University, Anderson, IN
3. Asbury University, Wilmore, KY
4. Azusa Pacific University, Azusa, CA
5. Belhaven University, Jackson, MS
6. Bethel College—IN, Mishawaka, IN
7. Bethel University, Saint Paul, MN
8. Biola University, La Mirada, CA
9. Bluefield College, Bluefield, VA
10. Bluffton University, Bluffton, OH
11. Bryan College, Dayton, TN
12. California Baptist University, Riverside, CA
13. Calvin College, Grand Rapids, MI
14. Campbellsville University, Campbellsville, KY
15. Carson-Newman College, Jefferson City, TN
16. Cedarville University, Cedarville, OH
17. College of the Ozarks, Point Lookout, MO
18. Colorado Christian University, Lakewood, CO
19. Corban University, Salem, OR
20. Cornerstone University, Grand Rapids, MI
21. Covenant College, Lookout Mountain, GA
22. Crown College, Saint Bonifacius, MN

23. Dallas Baptist University, Dallas, TX
24. Dordt College, Sioux Center, IA
25. East Texas Baptist University, Marshall, TX
26. Eastern Mennonite University, Harrisonburg, VA
27. Eastern Nazarene College, Quincy, MA
28. Eastern University, St. Davids, PA
29. Erskine College, Due West, SC
30. Evangel University, Springfield, MO
31. Fresno Pacific University, Fresno, CA
32. Geneva College, Beaver Falls, PA
33. George Fox University, Newberg, OR
34. Gordon College, Wenham, MA
35. Goshen College, Goshen, IN
36. Grace College & Seminary, Winona Lake, IN
37. Greenville College, Greenville, IL
38. Hannibal-LaGrange University, Hannibal, MO
39. Hardin-Simmons University, Abilene, TX
40. Hope International University, Fullerton, CA
41. Houghton College, Houghton, NY
42. Houston Baptist University, Houston, TX
43. Howard Payne University, Brownwood, TX
44. Huntington University, Huntington, IN
45. Indiana Wesleyan University, Marion, IN
46. John Brown University, Siloam Springs, AR
47. Judson College—AL, Marion, AL

48. Judson University, Elgin, IL
49. Kentucky Christian University, Grayson, KY
50. King College, Bristol, TN
51. The King's University College, Edmonton, AB
52. Lee University, Cleveland, TN
53. LeTourneau University, Longview, TX
54. Lipscomb University, Nashville, TN
55. Louisiana College, Pineville, LA
56. Malone University, Canton, OH
57. The Master's College & Seminary, Santa Clarita, CA
58. Messiah College, Grantham, PA
59. MidAmerica Nazarene University, Olathe, KS
60. Milligan College, Johnson City, TN
61. Mississippi College, Clinton, MS
62. Missouri Baptist University, Saint Louis, MO
63. Montreat College, Montreat, NC
64. Mount Vernon Nazarene University, Mount Vernon, OH
65. North Central University, Minneapolis, MN
66. North Greenville University, Tigerville, SC
67. North Park University, Chicago, IL
68. Northwest Christian University, Eugene, OR
69. Northwest Nazarene University, Nampa, ID
70. Northwest University, Kirkland, WA
71. Northwestern College—IA, Orange City, IA

72. Northwestern College—MN, Saint Paul, MN
73. Nyack College, Nyack, NY
74. Oklahoma Baptist University, Shawnee, OK
75. Oklahoma Christian University, Edmond, OK
76. Oklahoma Wesleyan University, Bartlesville, OK
77. Olivet Nazarene University, Bourbonnais, IL
78. Oral Roberts University, Tulsa, OK
79. Palm Beach Atlantic University, West Palm Beach, FL
80. Point Loma Nazarene University, San Diego, CA
81. Redeemer University College, Ancaster, ON
82. Roberts Wesleyan College, Rochester, NY
83. San Diego Christian College, El Cajon, CA
84. Seattle Pacific University, Seattle, WA
85. Shorter University, Rome, GA
86. Simpson University, Redding, CA
87. Southeastern University, Lakeland, FL
88. Southern Nazarene University, Bethany, OK
89. Southern Wesleyan University, Central, SC
90. Southwest Baptist University, Bolivar, MO
91. Spring Arbor University, Spring Arbor, MI
92. Sterling College, Sterling, KS
93. Tabor College, Hillsboro, KS
94. Taylor University, Upland, IN
95. Toccoa Falls College, Toccoa Falls, GA
96. Trevecca Nazarene University, Nashville, TN

97. Trinity Christian College, Palos Heights, IL
98. Trinity International University, Deerfield, IL
99. Trinity Western University, Langley, BC
100. Union University, Jackson, TN
101. University Of Mary Hardin-Baylor, Belton, TX
102. University of Sioux Falls, Sioux Falls, SD
103. University Of The Southwest, Hobbs, NM
104. Vanguard University of Southern California, Costa Mesa, CA
105. Warner Pacific College, Portland, OR
106. Warner University, Lake Wales, FL
107. Waynesburg University, Waynesburg, PA
108. Westmont College, Santa Barbara, CA
109. Wheaton College, Wheaton, IL
110. Whitworth University, Spokane, WA
111. Williams Baptist College, Walnut Ridge, AR

CCCU U.S. Affiliates

1. Arizona Christian University, Phoenix, AZ
2. Asbury Theological Seminary, Wilmore, KY
3. Atlanta Christian College, East Point, GA
4. Baylor University, Waco, TX
5. Bethany University—CA, Scotts Valley, CA
6. Campbell University, Buies Creek, NC
7. Central Christian College, Mcpherson, KS
8. Charleston Southern University, Charleston, SC

9. Columbia International University, Columbia, SC
10. Dallas Theological Seminary, Dallas, TX
11. Emmanuel College, Franklin Springs, GA
12. Franciscan University of Steubenville, Steubenville, OH
13. Fuller Theological Seminary, Pasadena, CA
14. Johnson University, Knoxville, TN
15. Kuyper College, Grand Rapids, MI
16. Lancaster Bible College, Lancaster, PA
17. Lincoln Christian University, Lincoln, IL
18. Mid-America Christian University, Oklahoma City, OK
19. Moody Bible Institute, Chicago, IL
20. Multnomah University, Portland, OR
21. Pepperdine University, Malibu, CA
22. Philadelphia Biblical University, Langhorne, PA
23. Regent University, Virginia Beach, VA
24. Samford University, Birmingham, AL
25. Southeastern Baptist Theological Seminary, Wake Forest, NC
26. Valley Forge Christian College, Phoenixville, PA
27. Walla Walla University, College Place, WA
28. William Jessup University, Rocklin, CA

AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE EVANGELICAL COVENANT CHURCH, EVANGELICAL LUTHERAN CHURCH IN AMERICA, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, GENERAL COUNCIL ON FINANCE AND ADMINISTRATION OF THE UNITED METHODIST CHURCH, INC., GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST, REV. GRADYE PARSONS, STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.), AND SALVATION ARMY NATIONAL CORPORATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

These *Amici* will address the following question:

Whether the unanimous holdings of twelve Courts of Appeal, both before and after *Employment Division v. Smith*, 494 U.S. 872 (1990), that religious institutions have the right to hire, fire, direct, and discipline employees who perform religious functions, without second-guessing by secular authorities, is properly grounded in the First Amendment Religion Clauses.

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INTERESTS OF *AMICI CURIAE*[*]

Amici, religious denominations and institutions described more fully in the attached Appendix, file this brief to address the constitutional basis for the ministerial exception. Respondents have not explicitly questioned the existence or legitimacy of the ministerial exception, but only its scope and reach. Similarly, the lower courts are unanimous in recognizing the exception, although there has been some disagreement regarding its precise reach. But some academics have questioned the exception, and *Amici* anticipate that *amici* in support of Respondents will argue that the ministerial exception lacks support in this Court's recent Free Exercise Clause cases, especially *Smith*. *Amici* intend here to explain why that is not so. Moreover, *Amici* believe an analysis of the historical and doctrinal foundations for the ministerial exception will assist the Court in defining its reach as well as affirming its legitimacy.

INTRODUCTION AND SUMMARY OF ARGUMENT

Every federal Court of Appeals to address the question has concluded that the First Amendment Religion Clauses entail a "ministerial exception" that precludes governmental intervention into the selection of clergy and other religiously significant employees. *See* Pet. Br. 17 n.10. Some of these decisions were rendered before this Court's decision in *Em-*

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[*] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. In accordance with Rule 37.6, *Amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *Amici*, has contributed monetarily to the preparation or submission of this brief.

ployment Division v. *Smith*, 494 U.S. 87 (1990), and some were rendered after that decision. No Court of Appeals has concluded that *Smith* in any way undercuts the ministerial exception.

The issue of church-state separation posed by the ministerial exception cases arises most frequently in the context of antidiscrimination laws, but it can arise also under labor law, unemployment compensation, contracts, wrongful discharge laws, and any other laws under which secular courts or agencies have occasion to question the basis for a religious institution's act of hiring, firing, disciplining, or controlling its religious employees. In each context, the question is whether governmental intervention threatens the essential separation between church and state that is embodied in the Religion Clauses.

The ability of churches — by which we mean religious institutions of all faiths — to determine their own doctrines and modes of worship, their own structures and systems of authority, and their own personnel, free from government interference, lies at the very core of this Nation's decision to foreswear any national establishment of religion and to guarantee the free exercise of religion to all faiths and denominations. Most important, government cannot interfere with "[f]reedom to select the clergy." *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952). "'[I]t is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them.'" *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 711 (1976) (quoting *Gonzalez* v. *Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929)). This principle inheres in the separation of church and state. The state may no more control the church — its doctrines,

structures, and personnel — than the church may control the state. *See Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 227 (1963) (Douglas, J., concurring). A religious institution can speak and act only through its appointed representatives and officers: its ministers and religious employees. It must have the freedom to choose who they are and to evaluate their performance under its own criteria.

The projection of nondiscrimination norms, originally crafted for application to the public institutions of government and commerce, onto religious societies generates two important types of church-state conflict. First, some of those nondiscrimination norms are flatly inconsistent with long-standing ecclesiastical and theological practices of a sacred nature. The most prominent example is the limitation of clergy in the Eastern Orthodox, Roman Catholic, Orthodox Jewish, Islamic, and some Protestant faiths to men. Other religious groups have requirements based on age, ethnicity, marital status, sexual practice, renunciation of rights to property (including minimum wages), familial lineage, or other factors that would rightly be regarded as invidious for employment decisions in the public and commercial spheres. Some churches, such as the autocephalous churches of Eastern Orthodoxy, are tied to particular nationalities; others, wishing to communicate effectively to particular ethnic communities, will deliberately seek out ministers and workers who share a community's ethnic character. Even the fundamental category of "religion" is sometimes partly a matter of ethnicity, as the examples of Judaism and some Native American religions illustrate. If there were no ministerial exception, all these faiths would be at legal risk.

Second, even when ecclesiastical requirements

and nondiscrimination laws are entirely in agreement, civil enforcement transfers power over employment decisions from the church to the state. Whenever a member of a protected class who has suffered an adverse employment action files a charge of discrimination, the question quickly becomes whether the church's reasons for its action were pretextual. *See McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804-805 (1973). Where, as is always the case when the ministerial exception applies, the employee's responsibilities are religious in nature, the reasons for the employment action necessarily will involve religious considerations: namely, whether the employee was carrying out the mission of the church in accordance with the church's standards. That is not a proper subject for governmental inquiry. "Federal court entanglement in matters as fundamental as a religious institution's selection or dismissal of its spiritual leaders risks an unconstitutional trespass on the most spiritually intimate grounds of a religious community's existence." *Hankins* v. *Lyght*, 441 F.3d 96, 117 (2d Cir. 2006) (Sotomayor, J., dissenting) (citation, alteration, and quotation marks omitted).

The right of churches to choose their own clergy long antedates the compelling interest test for burdens on religious exercise, which this Court repudiated in *Smith*. *See* 494 U.S. at 887. Indeed, it is as old as the Republic.

James Madison wrote long ago that the "Civil Magistrate is [not] a competent Judge of Religious truth." *Memorial and Remonstrance Against Religious Assessments* ¶ 5 (1785), *in Church and State in the Modern Age* 59, 61 (Maclear ed., 1995). If the separation of church and state means anything, it means that secular courts and agencies have no com-

petence to second-guess a church's evaluation of a religious worker's performance of a religious mission. Religious organizations must be "free to select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions." *Corp. of the Presiding Bishop* v. *Amos*, 483 U.S. 327, 341 (1987) (Brennan, J., concurring) (quotation marks omitted). This principle was expressly recognized and affirmed in *Smith*, and it is nowise diminished by this Court's recent cases.

ARGUMENT

I. The First Amendment Ended The Prior Authority Of Government To Intervene In The Selection And Discipline Of Clergy.

The Framers of the United States Constitution had decades of experience with government control over the qualifications, selection, discipline, and dismissal of clergy. Whatever else it meant to forbid an "establishment of religion" and instead to guarantee the "free exercise thereof," these phrases unequivocally meant that the new republican government would cease to have power to control the practice of religion by controlling the selection and discipline of clergy. These matters, central to their separate and independent existence, would be left to religious societies themselves.

A. The Prior Regime Of Established Religion

1. The Church Of England

The very essence of the "church by law established" in the United Kingdom and in colonial America prior to Independence — as reflected in the Supremacy Act and the Uniformity Acts — was the government's control over the selection and oversight of

ministers. The Act of Supremacy, originally passed in 1534, made the English monarch the supreme head of the Church of England with authority to "repress and extirp all errors, heresies and other enormities and abuses." Supremacy Act, 1534, 26 Hen. 8, c.1 (Eng.). As the head of the Church of England, the monarch stepped into the shoes of the Roman Catholic pontiff, assuming his authority to name the high officials of the Church. *See id.*; *see also* Act Restraynyng the Payment of Annates, 1534, 25 Hen. 8, c.20 (Eng.); William Blackstone, 1 *Commentaries* *376-383. The various Acts of Uniformity, which were periodically reenacted in slightly different forms, controlled religion in the kingdom by limiting service as a minister to persons who formally assented to the Thirty-Nine Articles of Faith (also enacted by Parliament) and agreed to follow the form of worship set forth in the Book of Common Prayer.[1] Any minister refusing to swear an oath of unfeigned assent to the Book and everything therein would "(ipso facto) be deprived of all his Spiritual Promotions." Act of Uniformity, 1662, 14 Car. 2, c.4 (Eng.). Government domination of religious practice was completed by enactment of additional Penal Law that prohibited unlicensed religious meetings and gatherings.[2]

Hobbes explained why. Thomas Hobbes, *Levia-*

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[1] *See* Act of Uniformity, 1662, 14 Car. 2, c.4 (Eng.); Act of Uniformity, 1559, 1 Eliz., c.2 (Eng.); First Act of Uniformity, 1549, 2 & 3 Edw. 6, c.1 (Eng.); *see also* G.R. Elton, *The Tudor Constitution: Documents and Commentary* 344-345, 397, 402-403 (2d ed. 1995).

[2] *See* Five-Mile Act, 1665, 17 Car. 2, c.2 (Eng.); Conventicles Act, 1664, 16 Car. 2, c.4 (Eng.); Act Against Papists, 1593, 35 Eliz., c.2 (Eng.).

than, ch. 42 (1651) (MacPherson ed., 1968) ("Of Power Ecclesiasticall"). "[M]en's actions are derived from the opinions they have of the Good, or Evill, which from those actions redound unto themselves," including eternal ones, and the sovereign necessarily must have power to control the public teaching of religion to ensure "the conservation of Peace among their Subjects." *Id.* at 567-568. Kings are the "Supreme Pastors of their people, and have power to ordain what Pastors they please, to teach * * * the People committed to their charge." *Id.* at 568. One of the tenets to which all clergy had to subscribe was the belief in the authority of the King or Queen in all matters spiritual and temporal. *See* Book of Common Prayer, Article of Religion 37 (1662) (Baskerville ed., 1762).

The system thus combined establishment and control of the official church with prohibition of the free exercise of religion by any other. In addition, the bishops of the Church sat (and voted) in the House of Lords. Through the Test and Corporation Acts,[3] civil and military offices, including the right to practice law or teach at Cambridge or Oxford, were limited to communicant members of the established church. Thus, the Crown maintained control over the church, and adherence to the church was a prerequisite to holding public office.

The idea of "toleration," as embodied in the Act of Toleration of 1689, was to broaden the range of permissible clergy to allow Presbyterians, Baptists, Independents, and other Trinitarian Protestants to

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[3] Second Test Act, 1678, 30 Car. 2, c.1 (Eng.); First Test Act, 1673, 25 Car. 2, c.2 (Eng.); Corporation Act, 1661, 13 Car. 2, c.1 (Eng.).

serve as ministers, even though they did not subscribe to the entire doctrine and forms of worship of the Church of England. Toleration Act, 1689, 1 W. & M., c.18 (Eng.). The government still maintained control, and no one could be a minister without government sanction. Toleration of Roman Catholicism, Unitarianism, and Judaism would wait another 150 years. *See* Ursula Henriques, *Religious Toleration in England: 1787-1833*, at 137, 188, 209 (1961).

2. The Anglican Colonies In America

On this side of the Atlantic, in colonies with established churches, the government similarly exercised ecclesiastical authority by controlling the selection, duties, and discipline of the clergy. In the colonies with the established Church of England — the five southern colonies from Maryland to Georgia, plus metropolitan New York — royal governors effectively controlled who would serve in the colony's pulpits. *See* Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* 1 (1994); Sanford H. Cobb, *The Rise of Religious Liberty in America: A History* 117, 330-333 (1902). Men wishing to serve as Anglican ministers also had to travel to the court of the Bishop of London and there swear an oath of allegiance to the Crown. *See id.* at 332; *see also* Nancy L. Rhoden, *Revolutionary Anglicanism: The Colonial Church of England Clergy During the American Revolution* 14 (1999). Virginia's First Charter required that all ministers would "provide that the Word and Science of God be preached, planted, and used * * * according to the rites and doctrine of the Church of England." Cobb, *supra*, at 74-75. Its Second Charter required an oath of supremacy specifically recognizing the monarch as head of the church. *Id.* And, as in England, the Virginia government extensively re-

gulated the conduct and discipline of clergy and other church leaders, empowering the governor to "suspend and silence" ministers' preaching without government approval. *See* William Waller Hening, 2 *The Statutes at Large; Being a Collection of All the Laws in Virginia* 46 (1823); *see also* H.J. Eckenrode, *Separation of Church and State in Virginia* 13 (1910). This model prevailed throughout the South, with variations.

Under canon law, Anglican ministers could be removed only by the relevant bishop (himself appointed by the Crown). Because there was no bishop in America, this function devolved upon the royal governor, which meant that both licensing and discipline of clergy was under gubernatorial control. When appointment of an Anglican bishop was suggested for America — Jonathan Swift's name was prominently mentioned as a candidate — Americans both in the Church of England and in the dissenting churches rebelled, thinking (with reason) that this would augur centralized control of the clergy, and with it a step toward uniformity in the practice of religion, to the detriment of dissenters. Cobb, *supra*, at 463-470; Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 126-129 (1986). As John Adams wrote, the proposal "excited * * * a general and just apprehension that Bishops, and Dioceses, and Churches, and Priests, and Tythes were to be imposed upon us by Parliament. * * * [A]nd if Parliament could tax us, they could install the Church of England, with all its Creeds, Articles, Tests, Ceremonies, and Tithes, and prohibit all other Churches as Conventicles and Schism-shops." Cobb, *supra*, at 470 (quoting Adams). The Virginia House of Burgesses passed a resolution

declaring the request for an English bishop a "pernicious project." *Journals of the House of Burgesses of Virginia 1770-1772*, at xxxi-xxxii (Kennedy ed., 1906).

As in the Mother Country, toleration arrived in Virginia, slowly, in the form of gubernatorial licensure of clergy from outside the Church of England, first Presbyterians and later a few others. Baptists refused as a matter of principle to seek licenses from the state, believing the call to ministry to be a wholly spiritual matter in which the government could not properly be involved. *See* Curry, *supra*, at 102; Eckenrode, *supra*, at 37-39; Rhys Isaac, *Evangelical Revolt: The Nature of the Baptists' Challenge to the Traditional Order in Virginia 1765-1775*, 31 Wm. & M. Q. 345, 366-367 (1974) (noting that in 1771, the Separate Baptists moved to deny fellowship to any minister who applied to the government for a license); George M. Brydon, 2 *Virginia's Mother Church* 181-182, 186-187 (1952). As a result, traveling Baptist preachers were jailed in Virginia for preaching without a license, even on the eve of the Revolution. James Madison's first known writing on the subject of religious liberty, a letter written in 1774 to his school friend William Bradford, noted:

> There are at this time in the adjacent county not less than five or six well-meaning men in close jail for publishing their religious sentiments, which in the main are very orthodox. I have neither patience to hear, talk, or think of anything relative to this matter; for I have squabbled and scolded, abused and ridiculed, so long about it to little purpose, that I am without common patience. So

> I must beg you to pity me, and pray for liberty of conscience to all.

Letter from James Madison to William Bradford (Jan. 24, 1774), *in* 1 *Letters and Other Writings of James Madison, 1769-1793*, at 10-13 (Lippincott ed., 1865).

3. New England

Establishment of a different sort — localized, more democratic, non-royal, dissenting — prevailed in the New England colonies of Connecticut, Massachusetts, New Hampshire, and Vermont prior to Independence. There also, control over selection of clergy was a centerpiece of the system. In the heyday of the New England Way in the 17th Century, the freeholders of each town had authority to choose the minister for the town church. Although in theory a minister of any denomination might be selected, the overwhelmingly Congregationalist (or "Puritan") character of the populace guaranteed a Congregationalist minister. *See* Jacob C. Meyer, *Church and State in Massachusetts from 1740 to 1833*, at 10-11 (1930); Curry, *supra*, at 89, 108. When that homogeneity began to break down — for example, in 1693 the town of Swansea voted to install a Baptist minister — the colonial legislature took various steps to ensure ministerial orthodoxy. For a period, cases of church-town conflict were referred to councils made up of neighboring churches, which virtually guaranteed Puritan orthodoxy, as dissenters might predominate in a town but were unlikely to predominate in a wider area. *See* Meyer, *supra*, at 11. Later, county courts were empowered to determine which minister would receive public support. *Id.* at 12. As a final expedient, the General Court — the colony's elected central gov-

ernment — reserved the power to appoint "learned and orthodox" ministers when towns failed to do so. *Id.* at 12. Only after Unitarian ministers began to win election in large numbers in the towns around Boston, in the 1830s, was this system abandoned and each church given the freedom to choose its own minister in accordance with its own doctrine and ecclesiology. *See* Cobb, *supra*, at 514-515.

Non-Congregationalist dissenters protested these arrangements because they gave the force of the state to the majority's religious judgment. As expressed by the Baptists of Ashfield, Massachusetts in a 1768 petition to the General Court: "if we may not settle and support a minister agreeable to our own consciences, where is liberty of conscience?" Stanley Grenz, *Isaac Backus — Puritan and Baptist* 172 (1983) (citations and quotation marks omitted).

In addition, the Massachusetts colonial legislature passed laws governing the training and qualifications of ministers, to ensure an "able, learned, and orthodox" ministry. Curry, *supra*, at 82 (quoting Massachusetts law). To combat the rise of itinerant preaching during the Great Awakening, which tended toward antinomianism and undermined the authority of local church leaders and ministers, some of the Puritan colonies enacted laws prohibiting preaching by anyone other than the "settled minister" of the town, unless he received permission from that minister. *Id.* at 96-97; *see also* William G. McLoughlin, 1 *New England Dissent, 1630-1833: The Baptists and the Separation of Church and State* 363 (1971). These laws generated controversy because they implied that the government had jurisdiction to control the preaching of the word of God. In a preview of disestablishmentarian sentiment that would come to the fore decades

later, many supporters of the Awakening denounced this exertion of government power over the church. In the best known and most oft-cited of these tracts, the Rev. Elisha Williams, a former rector of Yale College, argued that a law prohibiting uninvited ministers from preaching outside their own parishes was a violation of the "rightful dominion" of Christ, and no more legitimate than if "the king of France [should] take it into his head to prescribe laws to the subjects of the king of Great Britain." Elisha Williams, *The Essential Rights and Liberties of Protestants* (1744), *in* 1 *Political Sermons of the American Founding Era, 1730-1805*, at 68 (Sandoz ed., 2d ed. 1998). The legislature's attempt to regulate who could perform the ministerial function was an "unjust usurp'd authority." *Id.*

B. Disestablishment And Free Exercise

1. State Constitutional Developments

With the Revolution came almost immediate disestablishment of the Church of England in the revolting colonies. The Church's doctrinal commitment to the supremacy and authority of the royal monarch rendered the Church of England unpalatable in revolutionary America. Unsurprisingly, Anglican ministers, who had all taken oaths of loyalty to the Crown, were among the most active proponents of the Loyalist cause in America. *See* Rhoden, *supra*, at 6-7, 65, 67-78, 82-87. The establishment had been premised on the belief that state-selected clergy would inculcate belief in submission to the authority of the sovereign. It worked. The vast majority of Church of England ministers supported the Crown in opposition to the Revolution, while ministers selected by their own congregations almost uniformly adopted the op-

posite stance. *Id.*

In the newly independent and republican states, constitution drafters grappled with (among many other questions) the issue of church and state. Every state with a bill of rights or its functional equivalent — eleven in total — guaranteed the free exercise of religion. The possibility of establishment generated more controversy. Some states, such as Pennsylvania, Rhode Island, and Delaware, never had any establishment, and did not seriously consider creating one. *See* Curry, *supra*, at 159-161. Four New England states (but not Rhode Island) decided to continue a version of the localized New England Way, but with broader provisions allowing dissenting Protestants to opt out of the obligation to support the town majority church in favor of supporting their own. *See id.* at 162-192. Other states, among them New Jersey, Maryland, Virginia, South Carolina, and Georgia, debated creation of some form of what might be called a multiple establishment, in which residents were required to support, and perhaps to attend, a church, but were permitted to choose which one. Virginia famously debated such a proposal, championed by Patrick Henry, but rejected it after a determined campaign of opposition led by James Madison and supported by the absent Thomas Jefferson. Maryland and Georgia adopted such a system, but never put it into effect. *See id.* at 134-158.

Significantly, opposition to the multiple establishment system was based not only on its coerced support for religion, but also on the government control it would entail over the clergy and the church, which would have the additional effect of corrupting religion itself. *See* Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 Wm. &

Mary L. Rev. 1831 (2009). The founding generation considered this unacceptable. *See, e.g.*, Declaration of the Virginia Association of Baptists (Dec. 25, 1776), *in* 1 *The Papers of Thomas Jefferson* 660-661 (Boyd ed., 1950) (reasoning that if "the State provides a Support for Preachers of the Gospel," the State would gain the right to "judge and determine *who* shall preach; *when* and *where* they shall preach; and *what* they must preach") (emphasis in original); Koppelman, *supra*, at 1848-1893.

The selection of clergy was front and center during these state constitutional debates, as is most evident in the states that maintained an established church at the Founding and subsequently disestablished it. As part of the legal specification of what disestablishment meant, each of these States amended its constitution to declare, in various words, that "religious societies" enjoyed the "exclusive right" of selecting ministers and religious teachers. Me. Const. of 1820, art. I, § 3 ("[A]ll religious societies * * * shall at all times have the exclusive right of electing their public teachers, and contracting with them for their support and maintenance."); *see* N.H. Const. of 1784, pt. I, art. VI ("religious societies, shall at all times, have the exclusive right of electing their own public teachers"); Conn. Const. of 1818, art. VII, § 1 ("each and every [religious] society or denomination" has the "power and authority to support and maintain the ministers or teachers of their respective denominations"); Mass. Const. of 1780, amend. XI (1833) ("the several religious societies of this commonwealth * * * shall ever have the right to elect their pastors or religious teachers"). Freedom to select ministers was seen as an essential element of disestablishment.

Similarly, the Constitution of South Carolina,

which contained a unique form of limited establishment, *see* Curry, *supra*, at 210, also provided that "the people of this State may forever enjoy the right of electing their own pastors or clergy," S.C. Const. of 1778, art. XXXVIII. In one state, Maryland, long accustomed to establishment, the legislature proposed to create public officers to ordain clergy for the Anglican Church, but this proposal was defeated. *See* Curry, *supra*, at 154. No state in early America deviated from this pattern: where there was an establishment of religion, meaning compelled financial support, either governmental bodies or the political electorate controlled selection of clergy, but non-established churches enjoyed freedom to select clergy independently of the state.

2. The Framing Of The First Amendment

Three States — New Hampshire, New York, and Virginia — included in one form or another a declaration of religious freedom among their proposed amendments to the federal Constitution, as did also North Carolina, where the convention at first declined to ratify the Constitution until the proposed amendments were acted upon. Madison then, at the first session of Congress, proposed the First Amendment.

The First Amendment's Religion Clauses are precisely structured to guarantee against both sides of the establishment coin, at least at the federal level. The federal government would have no authority to pass laws equivalent to the Supremacy or Uniformity Acts, or to compel attendance or support for a church, thus depriving this new and distant government of the Hobbesian power to create an official church with

doctrines and personnel under state control.[4] By the same token, all religious societies would be free to exercise their religious faith in accordance with their own doctrines, forms of worship, and ecclesiastical structure.

Although the debates in the First Congress over what would be the Establishment Clause are sparse, we know that the core of the idea was to prevent government control over church affairs through an American version of the Uniformity Acts. Indeed, the Senate, which evidently had a narrower conception of religious liberty than the House, proposed an alternative that would have done little more. It read: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion * * * ." S. Journal, 1st Cong., 1st Sess. 129 (Sept. 9, 1789). The "establishment" of "articles of faith" and "modes of worship" concisely describes the Acts of Uniformity, which, as explained above, preconditioned the license to be a minister on his oath to support the Thirty-Nine Articles of Faith and the Book of Common Prayer. We would have no such thing in America. Instead, all churches would enjoy the "free exercise" of religion, meaning, at a minimum, the authority to control their own criteria for selection of clergy, doctrines, and liturgy. The House of Representatives insisted on a broader formulation, which is best read to preclude mandatory attendance

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[4] We do not claim, of course, that the only purpose of the Establishment Clause was to prevent erection of a formally established church. But that was obviously its central and most important effect. Moreover, the freedoms of speech, press, and particularly assembly provided additional guarantees of freedom for both religious and nonreligious societies, but those provisions are beyond the scope of this brief.

and support as well, and perhaps other interference with religious freedom, *id.* at 150-152 (Sept. 25, 1789), but there can be little doubt that the uncontroversial core of the Amendment, shared by both Houses, was essentially a liberation of the church, all churches, from the kind of governmental control that had been exercised under the prior regime.

It would be a mistake, therefore, to view the two Religion Clauses as isolated provisions, one prohibiting support or "advancement" of religion, *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971), and one prohibiting laws specifically directed against religion, *Smith*, 494 U.S. at 874. Rather, the separation of church and state reflected in the conjunction of the two clauses is as much a powerful protection of the independence of religious societies from the state as it is a guarantee against the abuse by those societies of governmental power to advance their causes. As Thomas Jefferson explained, "the government of the United States [is] interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises." Letter from Thomas Jefferson to Reverend Samuel Miller (Jan. 23, 1808), *in* Daniel L. Dreisbach, *Thomas Jefferson and the Wall of Separation Between Church and State* 153 (2002).

Not surprisingly, therefore, when the issue of government involvement in clergy selection first surfaced at the federal level, Secretary of State James Madison, after consulting with President Jefferson, declared in ringing terms that "the selection of ecclesiastical individuals" is entrusted entirely to the churches. Letter from James Madison to Bishop John Carroll (Nov. 20, 1806), *in* 20 *The Records of the American Catholic Historical Society* (Mar. 1909).

After completion of the Louisiana Purchase, Roman Catholic Bishop John Carroll, in imitation of European practice, consulted the Secretary of State about who to appoint to direct the church's affairs in the new territory. Madison responded that the appointment of church "functionaries" was "entirely ecclesiastical," and that he would adhere to "the scrupulous policy of the Constitution in guarding against a political interference in religious affairs." *Id.* It bears notice that Madison used the broad language of "functionaries" and "religious individuals" instead of the narrower language of clergy, bishop, or minister.

C. Early Common Law Cases

These principles of church-state separation often found expression in common law cases during the antebellum period. In *German Reformed Church* v. *Seibert*, 3 Pa. 282 (1846), for example, the Pennsylvania Supreme Court confronted the question whether a civil court could countermand a church's excommunication of a member. The court said no: Ecclesiastical tribunals "are the best judges of what constitutes an offence against the word of God and the discipline of the church," and "civil courts, if they should be so unwise as to attempt to supervise [ecclesiastical] judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt." *Id.* at 291; *see also Wardens of Church of St. Louis* v. *Blanc*, 8 Rob. (La.) 51, 84-85 (La. 1844); *Harmon v. Dreher*, 17 S.C. Eq. 87, *18 (S.C. Ct. App. Eq. 1843); *Shannon v. Frost*, 2 B. Mon. 253, 258 (Ky. Ct. App. 1842). As the Supreme Court of Judicature of New Jersey reasoned, "if the civil power prescribed rights of membership at all, it would naturally accommodate them to such doctrine, discipline and government as were most comfortable

to its own faith; which is the very groundwork of a religious establishment." *State* v. *Crowell*, 9 N.J.L. 390, 418-419 (1828); *see also* R.H. Tyler, *American Ecclesiastical Law* § 101 (1866) ("All questions relating to the faith and practice of the church and its members, belong to the church judicatories themselves.").

D. The Religion Clauses During The Post-Civil War Era

Reconstruction saw further debate about the scope of the Religion Clauses and the ability of religious groups to define their own membership and select their own leaders. Significantly, during the period of post-Civil War constitutional change, Americans and their representatives debated the scope of constitutional protections, including the Religion Clauses, and, in 1868, adopted the Fourteenth Amendment, by which the First Amendment is applied to the States. Legislative debates and judicial opinions from this era indicate that 19th Century Americans believed that the Religion Clauses protected a church's choice of minister. Though separated by time from the adoption of the First Amendment, such post-Civil War "understanding of the origins and continuing significance of the Amendment is instructive." *District of Columbia* v. *Heller*, 554 U.S. 570, 614 (2008).

1. Post-Civil War Legislative Debates

Immediately after adoption of the Fourteenth Amendment, Congress debated an issue very closely on point: whether generally applicable civil rights legislation could be applied to churches in such a way as to limit their right to discriminate with respect to members. An early version of what became the Civil Rights Act of 1875, ch. 114, 18 Stat. 335, 335-337

(1875),[5] extended the prohibitions of the Act to "church institutions" in common with railroads, inns, theaters, schools, and most other public conveyances and meeting places. Cong. Globe, 41st Cong., 2d Sess. 3434 (May 13, 1870) (Sen. Sumner). This is much like the application of Title VII or the ADA to Hosanna-Tabor. After a number of Senators objected on First Amendment grounds, churches were excised from coverage. *See* Cong. Globe, 42d Cong., 2d Sess. 899 (Feb. 8, 1872).

Senator Frederick Frelinghuysen of New Jersey — later floor leader in support of the Civil Rights Act — argued that the Act's application to the inner workings of churches was "an infringement of the Constitution." *Id.* at 896 (Feb. 8, 1872). He raised a series of hypothetical applications of the provision, which would be equally applicable to Title VII in the absence of a ministerial exception:

> Now, the Japanese, in California, see proper to make nationality, we will suppose, a part of their religion, and to exclude all who do not belong to their people from their worship; or, the Huguenots of South Carolina might form a religious society, and one of their regulations be that no one should be a member unless a descendant of the Huguenots; or, the Scotch Presbyterians might declare that none shall be connected with

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[5] The public accommodation provisions of the Civil Rights Act of 1875, which applied to private conduct, were invalidated in the *Civil Rights Cases*, 109 U.S. 3 (1883), as beyond the scope of the enforcement power granted to Congress by section 5 of the Fourteenth Amendment.

> their church unless producing a certificate from the church at home; or, the Africans might form a church making emancipation an essential to membership.

Id. at 847 (Feb. 6, 1872). The Act's "equal rights" mandate in such instances, he said, would impose "a restriction upon the perfect freedom of religious worship" by denying a church the "liberty to exclude those who do not meet the requirements stated." *Id.*

Other supporters of the Act likewise objected to the provision on constitutional grounds. Senator Matthew Carpenter of Wisconsin explained that the Act's application to churches was "in violation of the spirit of the Constitution in that it disregards the opinions and the motives of those who framed the Constitution, and is in conflict with what they believed they had secured." *Id.* at 759 (Feb. 1, 1872). Citing the debates in the Constitutional Convention and the Federalist Papers, Carpenter argued that "they who framed the Constitution of the United States intended to, and thought they had, carefully excluded the whole subject of religion from Federal control or interference." *Id.* He claimed, moreover, that the Religion Clauses were not directed solely "against the establishment of a particular faith to the prejudice or exclusion of others," but also barred certain laws that apply "equally upon all and compel[] all to observe its precepts." *Id.* Similarly, Senator Oliver Morton of Indiana argued that "[p]eople have a right to say how they will worship, what they will worship, and with whom they will worship; and, if they have a right to say how they will worship, and with whom they will worship, then under the Consti-

tution of the United States you cannot pass this provision with regard to churches." *Id.* at 898 (Feb. 8, 1872); *see also id.* app. at 5 (Jan. 25, 1872) (Sen. Lot Morrill) (citing Free Exercise Clause and arguing that provision "invade[s] the church"). Still other Senators objected to the provision on religious liberty grounds without explicitly invoking the Constitution. *See id.* at 897 (Feb. 8, 1872) (Sen. Anthony) ("I will not vote to put the first law upon the statute-book of the United States that interferes with religion * * * I would not * * * punish men for shutting the doors of their churches against any persons whom for any reason whatever they do not want to come into them; nor would I compel them to open or close their doors."); *id.* at 897-898 (Sen. Corbett) (similar).[6]

That is not to say that these Senators believed that the First Amendment generally exempted religious individuals from compliance with neutral and generally applicable statutes. Quite the contrary, Senator Frelinghuysen readily accepted that the Religion Clauses "do not mean that Congress shall pass no law regulating a man's opinions or feelings" and "do not mean that Congress shall pass no law regulating man's external conduct." *Id.* at 847 (Feb. 6, 1872). Instead, "the Constitution provides that Congress *shall pass no law prohibiting the free exercise of worship*." *Id.* (emphasis added); *see also id.* ("The 'exercise of religion' means worship. It can mean nothing else."). A religious institution's ability to define

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[6] To be sure, some Senators, including Senator Sumner, argued that application of the Act to churches did not violate the Constitution, *see, e.g.*, *id.* at 823-826 (Feb. 5, 1872); *id.* at 843 (Feb. 6, 1872) (Sen. Sherman). Their views, however, did not prevail, and even Senator Sherman ultimately voted to drop the reference to churches. *See id.* at 897 (Feb. 8, 1872).

the members of a congregation was an integral part of this "free exercise of worship." Evidently, the Congress that enforced the Fourteenth Amendment regarded the issue confronted by this Court in *Smith* as entirely distinct from the question of the freedom of churches to select members and leadership.

2. Post-Civil War Cases

Contemporaneously with the debate over the application of the Civil Rights Act to churches, this Court considered in *Watson* v. *Jones*, 80 U.S. 679 (1872), whether civil courts could properly determine who, within a church structure, was its proper leadership. The case arose out of a dispute between two bodies of a Presbyterian Church in Louisville, Kentucky over the subject of slavery. *See id.* at 681. The General Assembly of the Presbyterian Church formally recognized the anti-slavery faction, at which point members of the pro-slavery faction claimed that the General Assembly had abandoned its settled doctrine in determining that they did not represent the local church.

Echoing the state common-law cases from the preceding decades, this Court rejected the argument. The Court reasoned that, in the context of internal church disputes, "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." *Id.* at 727. Although *Watson* was a diversity case that did not expressly call for the application of the Religion Clauses, the Court based its reasoning on a "broad and sound view of the relations

of church and state under our system of laws." *Id.* The Court explained that it was "unquestioned" that voluntary religious associations possessed the "right" "to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association." *Id.* at 728-729. Civil courts thus had no role in second-guessing the internal decisions of religious associations. To the contrary, "[a]ll who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed." *Id.* at 729. Accordingly, ecclesiastical determinations internal to the church "should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for." *Id.*; *see also id.* at 730-731 ("'The judgments * * * of religious associations, bearing on their own members, are not examinable here.'") (quoting *Harmon*). Such ecclesiastical determinations include matters concerning "church discipline * * * or the conformity of the members of the church to the standard of morals required of them." *Id.* at 733.

A few years after *Watson*, the Court held in *Reynolds* v. *United States*, 98 U.S. 145 (1878), that an individual could not, on account of his professed religious beliefs, claim an "except[ion]" under the Religion Clauses from a congressional statute prohibiting polygamy. *Id.* at 166. In reaching this conclusion, *Reynolds* did not mention *Watson*, and nothing indicates that the *Reynolds* Court was overruling the

principle that it had announced in *Watson* only six years earlier. *Reynolds* thus suggests that the post-Civil War Court viewed the principle (announced in *Reynolds*) that a person generally may not "excuse his practices contrary [to the law] because of his religious beliefs," 98 U.S. at 166, as consistent with the principle (announced in *Watson*) that voluntary religious associations had a "right" to "create tribunals for the decision of controverted questions of faith within the association," 80 U.S. at 728-729. Instead of viewing these two principles as mutually contradictory, the post-Civil War Supreme Court evidently saw them as compatible strands in the tapestry of American religious liberty.

II. Consistent With The Original Understanding Of The Religion Clauses, This Court's Precedents Establish That Government May Not Interfere With The Right Of Religious Groups To Select Persons Who Perform Religious Functions.

This Court's jurisprudence has long recognized that government cannot interfere with core internal spiritual and ecclesiastical affairs of religious groups. In a series of cases, this Court has recognized "a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116; *see also EEOC* v. *Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996). Such freedom necessarily includes the authority to select ministers free from government interference. Just as government cannot select a church's religious message, neither can it pick the messenger by which the church delivers that mes-

sage.

Nothing in *Smith* disturbs this historically grounded doctrine. Indeed, in *Smith*, this Court recognized the continuing power of these cases, reasoning that "[t]he government may not * * * lend its power to one side or the other side in controversies over religious authority or dogma." 494 U.S. at 877 (citing, among other cases, *Kedroff*). *Smith* says nothing suggesting that these well-settled precedents were overturned, nor contradicting the original understanding of the Religion Clauses.

Abandonment of the "ministerial exception" by this Court would threaten the religious liberty of all Americans. The government would be free not only to apply antidiscrimination laws to religious institutions, but to impose other forms of ministerial licensing. Nothing, for example, would prevent the government from requiring religious teachers to meet certain professional qualifications, such as training in modern counseling techniques or in professional ethics, so long as those requirements were imposed on a neutral basis. *See, e.g.*, *HEB Ministries, Inc. v. Tex. Higher Educ. Coordinating Bd.*, 235 S.W.3d 627 (Tex. 2007).

Worse still, abandonment of the doctrine threatens to entangle courts in determining the sincerity of a church's religious views. In rejecting a balancing approach to the Free Exercise Clause in *Smith*, this Court explained that such an approach would "suggest that courts would constantly be in the business of determining whether the 'severe impact' of various laws on religious practice * * * suffices to permit us to confer an exemption." 494 U.S. at 889 n.5. That is precisely the problem that abandonment of the minis-

terial exception would create. In the absence of a ministerial exception, courts would be plunged into inquiries over whether a church's religious rationales for discharging a minister were sufficiently consistent and logical to pass muster under the demanding standards of antidiscrimination-law understandings of pretext. Those inquiries are no less intrusive than the inquiries this Court sought to avoid in *Smith*.

A. This Court Has Recognized That Federal Courts Lack Competence To Second-Guess A Religious Group's Selection Of Persons Who Perform Religious Functions.

As the Court held in 1872, it is "unquestioned" that voluntary religious associations have the "right" "to create tribunals for the decision of controverted questions of faith within the association." *Watson*, 80 U.S. at 728-729. That principle, as *Watson* recognized, stems from a "broad and sound view of the relations of church and state under our system of laws." *Id.* at 727. Indeed, this Court has subsequently observed that *Watson*, though technically a federal diversity case, "radiates * * * a spirit of freedom for religious organizations" grounded in the Religion Clauses. *Kedroff*, 344 U.S. at 116.

That freedom is nowhere more important than in the selection of clergy. Thus, in *Kedroff*, this Court recognized that the Religion Clauses protect a church's "[f]reedom to select the clergy." *Id.* *Kedroff* itself concerned which branch of the Russian Orthodox Church could occupy a piece of property. *See id.* at 95. But the case's reasoning turned most fundamentally on "the power of the Supreme Church Authority of the Russian Orthodox Church to appoint

the ruling hierarch of the archdiocese of North America." *Id.* at 115.

Similarly, in *Gonzalez*, the Court refused to require a Roman Catholic Archbishop to appoint the petitioner to a remunerative benefice to which he was otherwise entitled under the terms of a bequest. The Court held that "[b]ecause the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them." 280 U.S. at 16. On such matters, appropriate church authorities may make decisions that, "although affecting civil rights, are accepted in litigation before the secular courts as conclusive." *Id.*

And in *Serbian*, the Court affirmed the "general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them." 426 U.S. at 713. *Serbian* arose out of the Holy Assembly of Bishops and the Holy Synod of the Serbian Orthodox Church's suspension and removal of Milivojevich as Bishop of the American-Canadian Diocese of the Church. *See id.* at 698. Milivojevich claimed that the Church's actions were procedurally and substantively defective under general principles of Illinois common law. *See id.*

Serbian could have been viewed as requiring only the application of neutral rules of contract interpretation. *See, e.g., Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring) (explaining that cases like *Serbian*, in which "government must make decisions about matters of religious doctrine and religious law," "often arise in the application of otherwise neutral property

or contract principles to religious institutions"). But the Court did not see things that way. The Religion Clauses prohibited "the inquiries made by the Illinois Supreme Court into matters of ecclesiastical cognizance and polity." *Serbian*, 426 U.S. at 698. And its order reinstating a defrocked bishop had "unconstitutionally undertaken the resolution of quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals of this hierarchical church." *Id.* at 720.

In a different context, this Court has emphasized that "training for religious professions and training for secular professions are not fungible" under the Religion Clauses, because "[t]raining someone to lead a congregation is an essentially religious endeavor." *Locke* v. *Davey*, 540 U.S. 712, 721 (2004). That principle, we presume, must apply in a symmetrical fashion to ministerial *selection*. If it justifies denial of financial support under otherwise neutral laws, it must similarly justify exemption from intrusion by the state. Separation is a two-way street.

Smith recognizes and reaffirms the holdings of the church autonomy cases, explaining that "[t]he government may not * * * lend its power to one or the other side in controversies over religious *authority* or dogma." 494 U.S. at 878 (citing *Kedroff* and *Serbian*) (emphasis added). The issue in *Smith* was very different: Whether individuals have a Free Exercise right to exemption from neutral and generally applicable laws because of a conflict between their individual conscience and the requirements of the law. In holding that such a right was not subject to a balancing test applied by federal courts on a case-by-case basis, *Smith* did nothing to upset historically

(and doctrinally) grounded guarantees of church-state institutional separation, such as the ministerial exception.

B. Permitting Courts To Second-Guess The Selection — Or Termination — Of Ministers Will Seriously And Unconstitutionally Entangle Courts In The Affairs Of Religious Organizations.

The Court's precedents caution against government involving itself in disputes where "there is substantial danger that the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs." *Serbian*, 426 U.S. at 709. "First Amendment values are plainly jeopardized when * * * litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies * * * the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern." *Presbyterian Church* v. *Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969). Thus, the Establishment Clause prohibits the government from "involv[ing] itself too deeply in [a religious] institution's affairs." *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 591 (1989).

The risk of entanglement is heightened in the context of disputes over the selection, evaluation, and discipline of religiously significant employees. These are, as Madison said, an "entirely ecclesiastical" matter. *See supra* pp.18-19. When a court inquires into a church's decision that a religious employee is not

properly serving its religious mission, "[i]t is not only the conclusions that may be reached * * * which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 502 (1979). *Catholic Bishop* employed the technique of constitutional avoidance to hold that the National Labor Relations Act, a neutral law of general applicability, does not apply to teachers in a Catholic School. In doing so, the Court recognized that determining whether a religious school had engaged in an unfair labor practice "will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." *Id.*; *see also Amos*, 483 U.S. at 336 ("it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious").

Unconstitutional entanglement is inevitable in employment disputes involving ministers. When a member of a protected class brings an antidiscrimination lawsuit against a church, the church will respond by raising reasons for the discharge, which necessarily will have a religious dimension: namely, whether the minister had carried out the mission of the church in accordance with the church's standards. The entire inquiry before the Court would then become whether the church's religious reasons for its action were pretextual. *See McDonnell Douglas*, 411 U.S. at 804-805. A judge or jury would then be called upon to determine the sincerity of the church's religious reasons for discharging a particular minister. *See, e.g.*, *Tomic* v. *Catholic Diocese of Peoria*, 442 F.3d 1036, 1040 (7th Cir. 2006). Typically, in the secular

context, pretext is shown with such factors as the use of subjective criteria, inconsistencies in treatment of different cases, departures from the employer's stated criteria or procedure, and the like. *See, e.g.*, *White v. Columbus Metro. Hous. Auth.*, 429 F.3d 232, 242 n.6, 245-246 (6th Cir. 2005). In the religious context, none of these lines of inquiry are permissible. *See Thomas* v. *Review Bd.*, 450 U.S. 707, 714 (1980) ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection"); *Serbian*, 426 U.S. at 713-714 (secular courts may not second-guess whether church bodies have properly followed their own procedures).

The possibilities are endless, and the consequences for religious institutions dramatic. Would, for example, a court determine that the Catholic Church's limitation of clergy to men qualifies as a bona fide occupational qualification? Or that a priest is needed for carrying out a particular function in a religious mission? Would a jury determine that a Lutheran institution had a sincere belief in its religious doctrine that employment disputes must be resolved within the church, rather than through recourse to the civil courts? If a disabled person were passed over for the job of youth pastor, would a jury be asked to evaluate the sincerity of the Elder Board's testimony that the chosen candidate had a more compelling testimony of faith in Jesus Christ?

Indeed, the practicalities of an employment dispute more closely resemble the case-by-case inquiry in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), than the "across-the-board criminal prohibition of a particular form of conduct" in *Smith*. 494 U.S. at 884 (distinguishing, and not overruling, *Sherbert*). In *Sherbert*,

the availability of unemployment compensation came down to whether the employee's refusal of work on her Sabbath was "good cause" — requiring "individualized governmental assessment of the reasons for the relevant conduct." *Smith*, 494 U.S. at 884. If the nondiscrimination laws were applied without a ministerial exception, the outcome would depend on an "individualized governmental assessment" of the church's reasons for its employment decision. In *Sherbert*, as here, the relevant statute was formally neutral and generally applicable, but because the "eligibility criteria invite consideration of the particular circumstances," *id.*, the Court invalidated the law as applied to religiously observant individuals — a conclusion reaffirmed in *Smith*. *Id.* The same result should obtain here.

Disputes over who should fill religiously significant offices within religious institutions are precisely the kinds of subjects that the Religion Clauses place beyond the scope of governmental inquiry. Such matters are fundamentally internal to the operations of the church and are constitutive of its identity. And that is why "[f]ederal court entanglement in matters as fundamental as a religious institution's selection or dismissal of its spiritual leaders risks an unconstitutional trespass on the most spiritually intimate grounds of a religious community's existence." *Hankins*, 441 F.3d at 117 (Sotomayor, J., dissenting) (citation, alteration, and quotation marks omitted).

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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JUNE 20, 2011

APPENDIX

APPENDIX

The Evangelical Covenant Church is a denomination of evangelical Christian churches, with congregations throughout the United States. It has 832 churches in ten regions with an average attendance of 198,000. It grants clergy credentials to 2,300 ministers. It sponsors schools, hospitals, children's homes, retirement communities, shelters, and social services in the United States and in foreign countries. It has an interest in retaining its freedom and power to decide for itself matters of church governance, minister selection, as well as faith affirmations, belief, and actions.

The Evangelical Lutheran Church in America ("ELCA") is the largest Lutheran denomination in North America and the fifth largest Protestant church body in the United States. The denomination has 65 geographical judicatories, known as synods, and a churchwide office located in Chicago, Illinois. The ELCA encompasses approximately 10,000 member congregations, which in turn have some 4.5 million individual members nationwide. The fundamental governing document of the ELCA, which is known as the *Constitutions, Bylaws, and Continuing Resolutions of the Evangelical Lutheran Church in America*, proclaims that these three expressions of the church — congregations, synods, and churchwide organization — share responsibility for God's mission in the world. In order to carry out that mission, the individuals who lead the church are called upon to recognize their accountability to God, to the whole Church on Earth, to each other, and to the organization of this church in which they have been asked to serve. Their participation in God's mission on behalf of this church requires that they: "Proclaim God's saving

Gospel of justification by grace for Christ's sake through faith alone, according to the apostolic witness in the Holy Scripture, preserving and transmitting the Gospel faithfully to future generations." *Constitutions, Bylaws, and Continuing Resolutions of the Evangelical Lutheran Church in America*, 4.02.a (April 2011).

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church and represents nearly 65,000 congregations with more than 16 million members worldwide. In the United States, the Adventist Church has more than 5,000 congregations with more than one million members. The church employs over 4,100 ministers in the United States to carry out its mission in all fifty states. The Seventh-day Adventist Church has a strong interest in maintaining the freedom to determine who will minister to its members in the United States.

The General Council on Finance and Administration of The United Methodist Church, Inc., ("GCFA") is an Illinois corporation having its primary place of business in Nashville, Tennessee. GCFA is the financial and administrative arm of The United Methodist Church. GCFA is also charged with protecting the legal interests and rights of The United Methodist Church. The United Methodist Church is a religious denomination with approximately twelve million members worldwide. Through its various agencies, it performs mission work in over 150 countries. The United Methodist Church is one of the largest religious denominations in the United States. It has approximately 33,000 local churches and nearly eight million members in the United States.

The General Synod of the United Church of Christ is the representative body of the national setting of the United Church of Christ ("UCC") and is composed of delegates chosen by its Conferences, from member churches, voting members of Boards of Directors of Covenanted Ministries who have been elected by the General Synod as described in the bylaws of the UCC, and of ex officio delegates. The UCC was formed in 1957, by the union of the Evangelical and Reformed Church and the General Council of the Congregational Christian Churches of the United States in order to express more fully the oneness in Christ of the churches composing it, to make more effective their common witness in Christ, and to serve God's people in the world. The UCC has 5,600 churches in the United States, with a membership of approximately 1.2 million.

Rev. Gradye Parsons, as Stated Clerk of the General Assembly, is the senior ecclesiastical officer of the **Presbyterian Church (U.S.A.)** ("PCUSA"). The PCUSA is a national Christian denomination with nearly 2,077,000 members in more than 10,650 congregations, organized into 173 presbyteries under the jurisdiction of 16 synods. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706. This brief is consistent with the Constitution of the Presbyterian Church (U.S.A.) and policies of the General Assembly of the PCUSA regarding the Free Exercise Clause of the First Amendment. The religious liberty and church autonomy guarantees of this clause are foundational to our understanding of the relationship between the church and state. The General Assembly does not

claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the denomination's members.

The Salvation Army is an international religious and charitable organization with its headquarters in London, England. The Salvation Army is a branch of the universal Christian Church, its own religious denomination. The *amicus* in this action is The Salvation Army National Corporation, a non-profit religious corporation organized under the laws of the State of New Jersey. The Salvation Army National Corporation is the corporate instrumentality of The Salvation Army National Headquarters, which is responsible for coordinating national policies of the four independent Territories of The Salvation Army in the United States. The Salvation Army joins this *amicus* brief because of its concern with the constitutional implications that would be presented if courts were permitted to consider issues involving the fundamentally ecclesiastical relationship between a church and its clergy in conflict with *McClure v. The Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972).

AMICUS CURIAE BRIEF

No. 10-553

IN THE

Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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TABLE OF ABBREVIATIONS

A.C.	Appeals Cases (United Kingdom)
AGG	Allgemeines Gleichstellungsgesetz (German General Equal Treatment Act)
BGHZ	Bundesgerichtshof Zivilsachen (German Federal Court of Justice in Civil Matters)
BVerfGE	Bundesverfassungsgericht (German Federal Constitutional Court)
CETS	Council of Europe Treaty Series
ECHR	European Convention on Human Rights (formally Convention for the Protection of Human Rights and Fundamental Freedoms)
EComHR	European Commission on Human Rights
ECtHR	European Court of Human Rights
GBG	Gleichberechtigungsgesetz (Austrian Equal Treatment Act)
H.L.	House of Lords (United Kingdom)
ICCPR	International Covenant on Civil and Political Rights
ICLRS	International Center for Law and Religion Studies

I.C.R.	Industrial Cases Reports (United Kingdom)
IRLR	Industrial Relations Law Reports (United Kingdom)
O.N.S.C.	Ontario Superior Court of Justice (Canada)
OSCE	Organization for Security and Cooperation in Europe
ResDH	Citation system label for Council of Europe Committee of Ministers resolutions
UDHR	Universal Declaration of Human Rights
UN GAOR	United Nations General Assembly Official Records

IN THE

Supreme Court of the United States

No. 10-553

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* INTERNATIONAL CENTER FOR LAW AND RELIGION STUDIES AT BRIGHAM YOUNG UNIVERSITY IN SUPPORT OF PETTTIONER

INTEREST OF *AMICUS CURIAE*

This Brief *Amicus Curiae* in support of the petitioner is respectfully submitted pursuant to Supreme Court Rule 37.[1] The *Amicus*, the International Center for Law and Religion Studies ("ICLRS"), is an

[1] Pursuant to Supreme Court Rule 37(3)(a), all parties have consented to the filing of this brief. Pursuant to Rule 37(6), *Amicus* affirms that no counsel for a party authored the brief in whole or in part and no person other than the *Amicus* or its counsel made a monetary contribution to this brief.

academic center located at Brigham Young University. ICLRS and the university where it is housed are both institutions with profound concerns about the scope of the ministerial exception and its implications for their religious freedom in structuring their personnel practices. Because of its international engagement with religious freedom issues and with experts on these issues from around the world, ICLRS brings a unique comparative perspective to the question of the appropriate scope of the ministerial exception.

INTRODUCTION AND SUMMARY OF ARGUMENT

The American constitutional tradition has recognized from its inception that ministerial personnel play a vital and indeed constitutive role in the life of religious communities. Protecting this role becomes even more important as one examines the experience of other legal systems. From this vantage point, we draw on the resources of comparative law not only to confirm the widespread global recognition of the principles of religious autonomy that apply in this case, but perhaps even more importantly to underscore the distinctive strengths of the American approach and to highlight the hazards of narrowing religious autonomy in this critical domain.

Church-state law in the United States varies significantly from that of many countries around the world, in large part because of the Establishment Clause. In contrast to the United States, for example, many European countries retain strong ties with religious organizations, and a few continue to have established churches. What is striking, however, is that, despite these differences, European and other democratic societies broadly recognize the importance of the principles underlying the ministerial exception.

These principles, typically referred to under the rubric of "religious autonomy," include the freedom of religious groups to define their own beliefs and ecclesiastical polities, to carry out their religious missions as they understand them, and to do so through religious personnel of their own choosing. Countries throughout the world recognize that without the ability to define their own doctrines, mission, leadership, membership, organizational structure, and the like, religious organizations lack the authenticity and expressive integrity that religious freedom is designed to protect.

Religious autonomy is grounded in religious freedom, both the institutional freedom of religious organizations and the individual freedom of the believers to be able to exercise their religion together as they choose. It also finds support in the value of preventing state interference in religious affairs. In the United States, this principle is enshrined not only in rights to free exercise of religion but also importantly in the anti-entanglement principle of the Establishment Clause. However, even foreign states not bound by non-establishment principles recognize the importance of preserving the autonomy and independence of religious communities. Many countries also ground protections for religious autonomy in doctrines of freedom of expressive association, and protect, for example, political parties or trade unions, which often enjoy broad discretion with respect to employees who contradict opinions that their employers support.

Foreign jurisdictions provide broad protection for religious autonomy in cases equivalent to the ministerial exception in the United States courts. While there is variation in the exact scope of protection,

there is a consistent focus on the importance of the person's position to the religious mission or the organization. In the more than forty jurisdictions we reviewed, we found no case or statute in which ministerial status was determined by a test assessing the proportionality of time spent on religious duties.

Foreign equivalents to the ministerial exception have protected religious autonomy with respect to school teachers, teachers of religious doctrine, a public affairs spokesperson, and a nurse and a doctor working in a religious hospital.

While much foreign experience supports the principles and values of the ministerial exception in U.S. law, some foreign experience also provides cautions. The concerns about excessive entanglement of state and church that prompted the Establishment Clause in the first place remain vital. Governments in countries with narrower traditions of freedom have occasionally run roughshod over core notions of autonomy by intervening in contested appointments of religious personnel charged with ministerial functions. More repressive states elsewhere have barred religious organizations from determining their own hierarchical structure, selecting their own leaders, or otherwise managing their own ministerial personnel.

The American constitutional tradition that protects religious autonomy was designed to avoid just such interference with religious claims. Preservation of a broad ministerial exception in U.S. law ensures that this tradition will endure.

ARGUMENT

I. DEMOCRATIC SOCIETIES SHARE THE UNITED STATES' CONSTITUTIONAL COMMITMENT TO THE AUTONOMY OF RELIGIOUS INSTITUTIONS.

A. Religious Autonomy Enjoys Broad Foreign Protection.

Church-state relations in the United States differ in many ways from those in much of the world.[2] Many European countries, for example, still retain established churches and strong systems of cooperation with and funding of religious organizations.[3] In Germany and Austria, for instance, the state collects a "church tax" from members for the benefit of their respective churches as an aspect of church-state cooperation.[4] It is, therefore, striking to note the degree to which other countries, representing a wide range of church-state systems, have nonetheless recognized the need for an equivalent to the United States' ministerial exception, which protects religious organizations' ability to select, supervise, discipline, and remove leaders, teachers, and others who have ministerial functions.[5] Just as the United States

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[2] W. Cole Durham, Jr. & Brett G. Scharffs, *Law and Religion: National, International, and Comparative Perspectives* 114-122 (Aspen Publishers 2010).

[3] Gerhard Robbers ed., *State and Church in the European Union* (Nomos Publishers 2d ed. 2005) (hereinafter "Robbers, *State and Church*"); Silvio Ferrari & W. Cole Durham, Jr. eds., *Law and Religion in Post-Communist Europe* (Peeters 2003).

[4] *See* Gerhard Robbers, *State and Church in Germany*, and Richard Potz, *State and Church in Austria*, *in* Robbers, *State and Church*, 77, 89-90 and 391, 411-413.

[5] *Cases: See, e.g.*, Siebenhaar v. Germany, App. No. 18136/02 (ECtHR, Feb. 3, 2011); Obst v. Germany, App. No. 425/03

(ECtHR, Sept. 23, 2010); Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) v. Bulgaria, App. Nos. 412/03 and 35677/04 (ECtHR, Jan. 22, 2009); Supreme Holy Council of the Muslim Community v. Bulgaria, App. No. 39023/97 (ECtHR, Dec. 16, 2004); Hasan and Chaush v. Bulgaria, App. No. 30985/96 (ECtHR, Oct. 26, 2000); Serif v. Greece, App. No. 38178/97 (ECtHR, Dec. 14, 1999); Delgado Páez v. Colombia, U.N. Human Rights Committee, Communication No. 195/1985, U. N. Doc. CCPR/C/39/D/ 195/1985 (1990); Germany Federal Court of Justice in Civil Matters, Mar. 28, 2003, BGHZ 154, 306, 315 ("The question of whether a minister has been lawfully dismissed from his service is an absolute autonomous decision of the church or religious denomination.").

Law and International Instruments: *See, e.g.*, Czech Republic Const., arts. 15(1), 16(2); Danish Const. (1953), art. 67; German Basic Law, art. 140, incorporating Weimar Const. Art. 137 (affirming self-determination rights of religious bodies); Italy Const., arts. 7 & 8; Poland Const., art. 25(3); Portugal Law on Religious Freedom 16/2001, art. 15 § 1; Spain Const., art. 16, Dec. 29, 1978, and 1980 Organic Law on Religious Freedom, art. 6.1; OSCE Office for Democratic Institutions and Human Rights, *Concluding Document of the Vienna Meeting, 1989*, Principle 16.4, *in OSCE Human Dimension Commitments, Volume 2: Chronological Compilation*, 42-43, 3d ed. 2011 (hereinafter "Vienna Concluding Document"), *available at* http://www.osce.org/files/documents/b/0/76895.pdf. *See also* European Union Directive: 2000/78/EC, Nov. 27, 2000, art. 4 (covering broader range of employees, but still protecting religious autonomy with respect to ministerial personnel).

Authorities: *See, e.g.*, Gerhard Robbers, *Document submitted by the Government of the Federal Republic of Germany to the European Court of Human Rights in the Case of Obst v. Germany* (App. No. 425/03) (English translation, document available upon request) (discussing multiple jurisdictions); Richard Puza, *Report of Austria, in Legal Position of Churches and Church Autonomy* 57 (*Scripta Canonica* 3) (Hildegard Warnink ed., Peeters 2001) (hereinafter "Warnink, *Legal Position of Churches*"); Brigitte Schinkele, *Church Autonomy in Austria, in* Robbers, *Church Autonomy* 561 (Austria); Jan Velaers & Marie-Claire Foblets, *Religion and the Secular State in Belgium*,

in Religion and the Secular State: Interim Reports (hereinafter "*Interim Reports*") 103, 117 (Javier Martinez-Torrón & W. Cole Durham, Jr. eds., International Center for Law and Religion Studies 2010), *available at* http://www.iclrs.org/index.php?blurb_id=975) (Belgium); Jiří Rajmund Tretera, *Church Autonomy in the Czech Republic*, *in* Robbers, *Church Autonomy* 633, 640-641 ("Finding of the Constitutional Court . . . rejects the jurisdiction of secular courts in disputes dealing with the termination of service relationship involving members of clergy in accordance with article 16/2 of the Bill of Basic Rights and Freedoms."); Záboj Horák, *Czech Republic*, *in Interim Reports* 251, 258 (Czech Republic); Lisbet Christoffersen, correspondence with International Center for Law and Religion Studies (hereinafter "ICLRS") (June 2011, document available upon request) ("According to both theory and practice this free right to worship includes a right to self-determination and autonomy in matters of doctrine and ecclesiastical structures.") (Denmark); Merilin Kiviorg, *Religion and the Secular State in Estonia*, *in Interim Reports* 261, 265 (Estonia); Matti Kotiranta, *Religion and the Secular State in Finland*, *in Interim Reports* 273, 287 and communication with ICLRS (June 2011, document available upon request) ("[T]he Finnish State is neutral in matters of religion, and the Church is legally and administratively very independent in relation to the State.") (Finland); Brigitte Basdevant-Gaudemet, *State and Church in France*, *in* Robbers, *State and Church* 157, 174-176 ("[T]he civil courts regard themselves as incompetent to review the decisions of a bishop in suspending a priest or religious from his ecclesiastical functions, a step which could ultimately lead to his removal.") (France); Gerhard Robbers, *Church Autonomy in Germany*, *in* Warnink, *Legal Position of Churches* 121, 122 (German constitution "guarantees autonomy of all religious and ideological communities regardless of their religious creed.) (Germany); Balázs Schanda, *State and Church in Hungary*, *in State and Church* 323, 336-337; Balázs Schanda, *Church*

Autonomy and Religious Liberty: National Report on Hungary, *in Church Autonomy: A Comparative Survey* 541, 548-549 (Gerhard Robbers ed., Peter Lang 2001) (hereinafter "Robbers, *Church Autonomy*") (Hungary); James Casey, *Ireland: Preliminary Report*, *in* Robbers, *Church Autonomy* 87, 89; Carmen Garcimartín, *Religion and the Secular State in Ireland*, *in Interim Reports* 403, 412 ("Matters such as a church's teachings, their religious internal organization, or the number of ministers required for a certain task, do not fall within the powers of the State. . . . Religious autonomy means that each denomination is entitled to create its own system: a church tribunal, with jurisdiction exclusively on internal affairs like disciplinary matters.") (Ireland); Gianni Long, *Church Autonomy in Italy*, *in* Robbers, *Church Autonomy* 319 (Italy); Ringolds Balodis, *State and Church in Latvia*, *in* Robbers, *State and Church* 253, 270-271 (Latvia); Jolanta Kuznecoviene, *State and Church in Lithuania*, *in* Robbers, *State and Church*, 283, 292-293, 296-297 (Lithuania); Alexis Pauly, *State and Church in Luxembourg*, *in* Robbers, *State and Church* 305, 315-318 (Luxembourg); Sophie van Bijsterveld, *Religion and the Secular State in the Netherlands*, *in Interim Reports* 524, 530-531 (Netherlands); Ingvill Thorson Plesner, *State Church and Church Autonomy in Norway*, *in* Robbers, *Church Autonomy* 467 (Norway); Peter Roudik, *Church Autonomy in the Russian Federation*, *in* Robbers, *Church Autonomy* 505; Lev Simkin, *Church and State in Russia*, *in Law and Religion* 261, 275 (Russia); Dusan Rakitic, communication with ICLRS (June 2011, document available upon request) ("[Serbia Const., art. 8, para. 1] expressly provides that ministers and religious officials are elected and appointed by churches and religious communities in accordance with their own autonomous regulations.") (Serbia); *Francis* Lyall, *Religion and the Secular State in Scotland*, *in Interim Reports* 593, 594 (Scotland); Michaela Moravčíková, *State and Church in the Slovak Republic*, *in* Robbers, *State and Church* 491, 508-509 (Slovakia); Lars Friedner, *State and Church in Sweden*, *in* Robbers, *State and Church* 537, 547; Emma Svensson, correspondence with ICLRS (June 2011, document available upon request) (detailing three ways in which religious organizations in Sweden can impose religious requirements on employees) (Sweden); Anthony Bradney, *Religion and the Secular State in the United Kingdom*,

has consistently striven to "chart a course that preserve[s] the autonomy and freedom of religious bodies,"[6] so too foreign jurisdictions have repeatedly recognized how essential autonomy is to religious freedom.[7] For example, the European Court of Human Rights has described the autonomy of religious organizations as "indispensable for pluralism in a democratic society and . . . an issue at the very heart of the protection [of religious freedom]."[8]

A religious group's ability to select, supervise, discipline, and remove employees who carry out their religious mission, as well as to determine the group's beliefs and membership, is often described as the right to religious autonomy.[9] It is also described

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in Interim Reports 737, 741; Mark Hill, *Church Autonomy in the United Kingdom. in* Robbers, *Church Autonomy* 267, 277-280; David McClean, *State and Church in the United Kingdom. in* Robbers. *State and Church* 553. 568-570 (United Kingdom).

[6] Walz v. Tax Comm'n of New York City, 397 U.S. 664, 672, 90 S.Ct. 1409, 1413, 25 L.Ed.2d 697 (1970). *See* Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 341-42 (1987) ("Religious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to 'select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.'") (quoting Douglas Laycock. *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1389 (1981) (Brennan, J. concurring)).

[7] *See infra* notes 14-16.

[8] Hasan and Chaush v. Bulgaria, App. No. 30985/96 (ECtHR) para. 62.

[9] *See generally* Warnink, *Legal Position of Churches*, and Robbers. *Church Autonomy*.

as "sphere sovereignty,"[10] "self-determination of churches,"[11] or "non-intervention of the state in religious affairs."[12] While the precise contours of the right vary from country to country, the right of religious organizations to choose or dismiss ministerial personnel is broadly held to be an essential element of religious autonomy.[13]

B. The Commitment to Religious Autonomy in Other Legal Systems Is Grounded on Principles Parallel to Those that Undergird the U.S. Ministerial Exception.

Protections for religious autonomy in other legal systems are based in some cases on explicit constitutional provisions[14] or international norms,[15] but they

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[10] *See, e.g.*, Johan D. van der Vyver, *Sphere Sovereignty of Religious Institutions: A Contemporary Calvinistic Theory of Church-State Relations*, *in* Robbers, *Church Autonomy* 645, 650.

[11] *See, e.g.*, Sophie C. van Bijsterveld, *State and Church in the Netherlands*, *in* Robbers, *State and Church* 367, 376.

[12] *See* Jan Velaers & Marie-Claire Foblets, *Religion and the Secular State in Belgium*, *in Interim Reports* 103, 117 ("According to the Constitution, interference in religious affairs is prohibited.") (translation from the French).

[13] *See supra* note 5.

[14] Albania Const., Nov. 28, 1998, art. 10(4) ("The state and the religious communities mutually respect the independence of one another and work together for the good of each and all (5) Relations between the state and religious communities are regulated on the basis of agreements entered into between their representatives and the Council of Ministers."); Belgium Const. (1994 as amended 2008, new English translation 2009), art. 21 ("The State does not have the right to intervene either in the appointment or in the installation of ministers of any religion whatsoever."); Charter of Fundamental Rights and Freedoms, Resolution of the Presidium of the Czech National Council, Dec. 16, 1992, art. 16(2) ("Churches and religious societies govern

are for the most part grounded in general constitutional and international protections for freedom of religion.[16] Unless religious communities can

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their own affairs; in particular, they establish their own bodies and appoint their clergy, as well as found religious orders and other church institutions, independent of state authorities."); Germany Basic Law, art. 140, incorporating art. 137 of the Weimar Const. ("(3) Every religious society shall regulate and administers its affairs independently within the limits of the law that applies to all. It shall confer its offices without the participation of the state or the civil community."); Hong Kong Const., art. 141 § 1 ("The Government of the Hong Kong Special Administrative Region shall not restrict the freedom of religious belief, interfere in the internal affairs of religious organizations or restrict religious activities which do not contravene the laws of the Region."); Poland Const., art. 25(2)-(5) ("The relationship between the State and churches and other religious organizations shall be based on the principle of respect for their autonomy and the mutual independence of each in its own sphere, as well as on the principle of cooperation for the individual and the common good."); Romania Const., art. 29(5) ("The religious denominations are autonomous in relation to the state and enjoy its support.).

[15] Vienna Concluding Document, Principle 16.4.

[16] Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "ECHR"), CETS No. 005 (entry into force Sept. 3, 1950), art. 9; Treaty of Lisbon in art. 17 of the draft Treaty on the Functioning of the European Union (9.5.2008 EN Official Journal of the European Union C 115/55). Albania Const., Nov. 28, 1998, art. 10(6); Bulgaria Const., July 12, 1991, art. 37(1); Georgia Const., Aug. 24, 1995, art. 9(1); India Const., art. 26 ("Subject to public order, morality and health, every religious denomination or any section thereof shall have the right . . . (b) to manage its own affairs in matters of religion); Italy Const., arts. 7, 8, 20; Jamaica Const. 1962, chap. 3, art. 21(3); Japan Const. arts. 20, 89; Liechtenstein Const., arts. 38, 43; Lithuania Const., art. 43; Luxembourg Const., art. 22); Portugal Const., art. 41(4); Russia Const., art. 28); Serbia Const., arts. 11, 44, 81; Slovakia Const. art. 1; Slovenia Const., art. 7 ("The state and religious communities

broadly define their own doctrines, beliefs, mission, leadership, membership, organizational structure, operational activities, and the like, they lack the authenticity and expressive integrity that religious freedom is designed to protect. The structure and organization of a religious organization are themselves religious questions.[17] The selection of religious leaders, spokespersons, and teachers are key expressions of the freedom of religious communities to structure their own affairs.

Accordingly, principles of religious autonomy have been understood internationally to flow not only from institutional rights, but also from the collective exercise of individual religious freedom, or freedom to manifest one's beliefs "in community with others."[18]

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shall be separate. Religious communities shall enjoy equal rights; they shall pursue their activities freely."); Switzerland Const., art.72; Ukraine Const., art. 35.

[17] *See, e.g.*, discussion in W. Cole Durham, Jr. & Elizabeth A. Sewell, *Definition of Religion*, in *Religious Organizations in the United States: A Study of Identity, Liberty, and the Law* 3-84 (James A. Serritella et al. eds., Carolina Academic Press 2005).

[18] The Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) both recognize in nearly identical language that "[e]veryone shall have the right to freedom of thought, conscience and religion" and that "[t]his right shall include . . . freedom, either individually, or in community with others, and in public or private, to manifest his religion . . . ." (UDHR, art. 18, GA res. 217A (III), UN Doc A/810 at 71 (1948); ICCPR, art. 18, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966)). The idea of manifesting or exercising one's religion in public and in community with others is a consistent source of international recognition of the institutional and collective right of autonomy belonging to religious organizations. (*See* UN General Assembly, Declaration on the Elimination of All Forms of Intolerance and of

One of the major commitments made by states belonging to the Organization for Security and Cooperation in Europe, for example, is that, "[i]n order to ensure the freedom of the individual to profess and practice religion or belief the participating States will, *inter alia*, . . . respect the right of religious communities to . . . organize themselves according to their own hierarchical and institutional structure, [and] . . . select, appoint and replace their personnel in accordance with their respective requirements and standards."[19] The European Court of Human Rights has also underscored the individual and collective nature of religious autonomy:

> [T]he right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention.[20]

In addition, religious autonomy has been grounded internationally in the importance of preventing interference by the state in internal church affairs[21]—a

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Discrimination Based on Religion or Belief, art. 6 ("the right to freedom of thought, conscience, religion or belief shall include . . . the following freedoms: (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief"), 25 November 1981, A/RES/36/55).

[19] Vienna Concluding Document, Principle 16.4.

[20] *Metropolitan Orthodox Church of Bessarabia*, App. No. 45701/99 (ECtHR) para. 118.

[21] *Serif*, App. No. 38178/97 (ECtHR); *Hasan and Chaush*, App. No. 30985/96 (ECtHR) (where the organization of the religious community is at issue, Article 9 (freedom of religion) of

concern that is enshrined in the anti-entanglement principle in the U.S. Establishment Clause.[22] Support for this principle takes different forms. Sometimes it is a direct inference from general freedom of religion provisions.[23] Sometimes it derives from specific provisions affirming the autonomy of religious communities.[24] Sometimes it follows from broad commitments to state neutrality.[25] Many countries have no corollary to the U.S. Establishment Clause. Significantly, even states that allow greater blurring of the separation of church and state consistently respect the right of religious communities to autonomy in decisions relating to religious personnel that carry out ministerial functions. *See supra* note 5. They understand that such decisions are vital to religious freedom, and should not be subjected to second-guessing by state officials and state courts.

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the Convention must be interpreted in the light of Article 11 (freedom of association), which safeguards associative life against unjustified State interference); *Obst*, App. No. 425/03 (ECtHR) (balancing religious autonomy and Article 8 (privacy)); *Siebenhaar*, App. No. 18136/02 (ECtHR) (reading Article 9 together with Article 11, to safeguard associative life against unjustified interference by the State). *See also* Robbers, *Germany*, *in* Warnink, *Legal Position of Churches* 121; *Metropolitan Orthodox Church of Bessarabia*, App. No. 45701/99 (ECtHR); Hong Kong Const., art. 141 §1.

[22] Agostini v. Felton, 521 U.S. 203, 232-33 (1997).

[23] *See supra* note 21.

[24] German Basic Law, art. 140, incorporating art. 137 of the Weimar Constitution; Serbia Const. art. 8; *see also* Dusan Rakitic, correspondence with ICLRS (June 2011, document available upon request).

[25] *See* Gerhard Robbers, *Church Autonomy in Germany Including an Attachment on Relevant European Union Law*, *in* Warnink, *Legal Position of Churches* 121.

In many cases, religious autonomy also has been identified with the freedom of expressive association. (See Pet. Br. at 33-35.) In Austria, Germany, France, and Italy, for example, the broad scope of religious organizations enjoying autonomy (such as church-related hospitals, homes, schools and kindergartens) has been compared to "tendency" or "ideological" organizations, such as political parties or trade unions, which also enjoy a broad right to dismiss representatives who contradict opinions supported by their employer.[26] In Spain, the Constitutional Court has held that employees of ideological institutions have a duty of good faith and loyalty to their employer's creed; all employees, even those not directly involved in spreading an employer's beliefs, may not act in a way that would cause friction with those beliefs, even when such actions happen outside the workplace.[27]

These principles are even more pertinent to religious organizations because of the special protections afforded by religious freedom norms.[28] Religious

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[26] *Id.*; Austrian Equal Treatment Act 2004 (GBG) § 20 ¶ 2 (*available at* http://www.bka.gv.at/site/6814/default.aspx); German General Equal Treatment Act 2006 (AGG) § 6; Hildegard Warnink, *The Autonomy of Religious Confessions in France*, *in* Warnink, *Legal Position of Churches* 111, 118; Silvio Ferrari, *State and Church in Italy*, *in* Robbers, *State and Church* 209, 220-221 (comparing religious organizations with special tendency organizations such as political parties, trade unions, and the like, whose employees are expected to respect the purposes of the organization).

[27] Constitutional Court of Spain Judgment 5/1981, Feb. 13, 1981 (legal basis 11th); *see also* Judgment 38/2007, Feb. 15, 2007.

[28] *See, e.g.*, Gerhard Robbers, *State and Church in Germany*, *in* Robbers, *State and Church* 77, 87-88 (Church employees "owe

groups need the right to discipline or remove disloyal employees or those who would impair their ability to communicate their message, as determined by the organization using its own criteria. Second-guessing either the decision or the criteria on which a religious group bases its decision regarding employment of ministers is by nature normative and would place the state above the group's leadership in the religious hierarchy.

In sum, religious autonomy enjoys broad protections in legal systems around the world which corroborate the fundamental importance of the ministerial exception in U.S. law. The European Court of Human Rights, in interpreting the protection of religious freedom in Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, has explained that protections of religious autonomy are key to protecting pluralism in a democratic society:

> The right to freedom of religion for the purposes of the Convention excludes assessment by the State of the legitimacy of religious beliefs or the ways in which those beliefs are expressed. State measures favouring a particular leader or specific organs of a divided religious community

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a particular obligation of loyalty to their Church employer") and Richard Potz (Austria), correspondence with ICLRS (June 2011, document available upon request) ("A special relationship with the church or religious community as employer results from direct participation in the pursuit of denominational aims. This expresses itself in a special sort of allegiance: acceptance of the teaching of the church or religious community and an appropriate way of life, as well as in a special duty of care by the church employer. This allegiance may vary with the importance of a person's work to the church's spiritual mission.").

> or seeking to compel the community or part of it to place itself, against its will, under [particular] leadership, would also constitute an infringement of the freedom of religion. ... [T]he autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords.[29]

II. RELIGIOUS AUTONOMY PROTECTS SELECTION, SUPERVISION, DISCIPLINE, AND REMOVAL OF THOSE IN MINISTERIAL CAPACITIES.

A. Religious Autonomy Protections Extend to a Religious Organization's Choice of Those with Ministerial Responsibilities.

As demonstrated in the prior section, foreign and U.S. laws have generally recognized that religious communities enjoy the right of self-determination in matters of doctrine and ecclesiastical structure.[30] In nearly every consolidated democracy, the state simply cannot and will not dictate what a church should believe or how it should conduct its internal affairs.[31] Similarly, states recognize, through protections such as the ministerial exception, the ability of

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[29] *Metropolitan Orthodox Church of Bessarabia*, App. No. 45701/99 (ECtHR) paras. 117-118.

[30] Watson v. Jones, 80 U.S. 679 (1872); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); *Hasan and Chaush*, App. No. 30985/96 (ECtHR); *Schüth*, App. No. 1620/03 (ECtHR); Lombardi Vallauri v. Italy, App. No. 39128/05 (ECtHR, Oct. 20, 2009).

[31] *See, e.g., supra* notes 14-15.

religious organizations to select, supervise, discipline, and remove those whose activities are important to the mission of the organization.[32]

The German Federal Constitutional Court, for example, in a case upholding the right of a Catholic hospital to terminate a doctor who publicly opposed its anti-abortion stance and upholding the right of a Catholic hostel to terminate a bookkeeper who had resigned his membership from the Catholic Church, has explained that exactly these sorts of protections are part of a religious organization's "freedom to organize and administer its own affairs."[33] The Constitutional Court explained that the church's "right of self-administration and self-determination comprises all measures that are to be taken in pursuit of the charitable and social ministry tasks arising from the church's fundamental mandate, for example, . . . the selection of staff."[34] Autonomy in staffing decisions allows churches to ensure the "religious dimension" of its activities according to the church's understanding of itself."[35] The Constitutional Court stressed the significance of these ministerial exception-type protections: in them "[t]he guarantee of freedom to organize and administer [a church's] own affairs is . . . shown to be a necessary, legally independent guarantee which adds to the freedom of religious life and [a church's] freedom of determination with regard to organization,

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[32] *See supra* note 5.

[33] BVerfGE 70, 138 (1985), 2 BvR 1703, 718/83 and 856/84, as translated in W. Cole Durham, Jr. & Brett G. Scharffs, *Law and Religion: National, International, and Comparative Perspectives* 409 (Aspen Publishers 2010).

[34] *Id.*

[35] *Id.*

legislation and administration that is indispensable for the church to carry out its tasks."[36]

These sorts of ministerial exception-type protections recognize that religious organizations must be able to exercise autonomy in selecting leaders, teachers, and others who have a significant impact on the ability of the organization to carry out its mission. These positions are highly sensitive for the religious mission of the organizations involved. Leaders shape and articulate doctrine, and religious teachers and those with influence on believers and the public at large play a formative role in others' beliefs and preserve the credibility and authenticity of the organization's tenets.

Ministerial exception-type protections thus preserve institutional integrity and authenticity and also serve to support the ability of religious organizations to maintain doctrinal integrity and promulgate their own beliefs.[37] Countries throughout the world provide such protections in situations involving selection, supervision, discipline, and removal of those in ministerial-type capacities.[38]

B. Religious Autonomy Protections Extend to Those with Roles Important to the Mission of Religious Organizations.

The principles underlying the ministerial exception are grounded in providing religious organizations with both maximum autonomy from the state and self-determination in the organization's mission. In

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[36] *Id.*

[37] *See* Grégor Puppinck, correspondence with ICLRS (June 2011, document available upon request).

[38] *See supra* note 5.

contrast to the approach taken by the Sixth Circuit in *Hosanna-Tabor*, we have not found any support for the notion that determination of eligibility to invoke the ministerial exception should turn on the percentage of an employee's time devoted to religious tasks. To the contrary, protection for religious autonomy in these contexts is more likely to take into account the importance of the activities to the religious mission of the organization. This substantive approach to the ministerial exception is widely recognized internationally.

The countries that have addressed this issue agree that the application of the ministerial exception is based on the importance to the religious organization of the activities conducted by employees.[39] For example, French courts have held that employees hired "for a task that implies that the employee be in communion of thought and faith with her employer"[40] are subject to ministerial exception-type autonomy protections for their employer.[41] These "committed" employees are identified by the functions they

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[39] *See* Austrian Labor Relations Act, ArbVG § 36 ¶ 2-6, Definition of an Employee; Austrian Equal Treatment Act (GBG) § 20 ¶ 2; *also* Richard Potz & Brigitte Schinkele, correspondence with ICLRS (June 2011, document available upon request) ("The crucial issue [in Austria] is the concept of grading loyalties according to the intensity the employee is involved in the genuine Church mission and mandate."); *also* Balázs Schanda, *State and Church in Hungary*, *in* Robbers, *State and Church* 323, 336-337.

[40] Cass. Soc., 20 Nov. 1986, Delle Fischer c/ Unacerf: JPCG, 1987, II, 110798, note Revet, T.; *see generally* Francis Messner, *The Autonomy of Religious Confessions in France*, *in* Warnink, *Legal Position of Churches* 111, 119.

[41] Messner, *The Autonomy of Religious Confessions in France* 111, 119 (quoting *Delle Fischer c/ UNACERF*).

perform and whether they have direct contact with the followers of a religion and thus can influence them.[42]

German courts consider "the credibility of the church and of its proclamation of [what] the Gospel requires," what are "specifically church tasks," and what the employee's "proximity" to them is, but allows the churches to decide these points and thus "to make binding provisions" on these determinations.[43]

Courts in the United Kingdom have resisted creating a set of factors for determining whether a church worker is a protected non-employee "servant of God."[44] They have, however, looked at considerations such as (1) the offer and acceptance of a church post; (2) the finite and specified duration of a church post; (3) the existence of specified ministerial duties; (4) payment to the minister, including travelling expenses, holiday pay, and living allowance; (5) spiritual ordination to the ministerial position; (6) the amount of control exercised by the church over the minister in the execution of his/her duties; and (7) whether ruling that an individual is not a minister would be contrary to the church's doctrine.[45] Of par-

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[42] *Id.*

[43] BVerfGE 70, 138 (1985), 2 BvR 1703, 718/83 and 856/84.

[44] President of The Methodist Conference v. Parfitt [1984] I.C.R. 176, 183.

[45] *See* Percy v. Board of National Mission of the Church of Scotland [2006] 2 A.C. 28 (H.L.) 40 ("In the United Kingdom the issue that prevails in ministerial exception cases is whether or not a minister is an employee of his/her church."); *President of The Methodist Conference* at 182; Barthorpe v. Exeter Diocesan Bd. of Finance [1979] I.C.R. 900, 905; New Testament Church of God v. Stewart [2008] I.C.R. 282 (C.A.) 296.

ticular note is that we have been unable to identify *any* foreign jurisdictions that calculate percentage of time spent on religious as opposed to secular duties of an employee in determining whether religious autonomy protections should apply.

Some common types of "ministerial" positions that fall within the protection of religious autonomy in other legal jurisdictions include teachers, leaders and spokespersons, and other important roles, both those clearly religious and those otherwise significant to the mission of a religious organization. The teaching of religious doctrine is critically important to the mission and vitality of a church. For most religions, doctrinal teachings are the heart and substance of what they offer to the world. Because no aspect of a religion is as uniquely important as its message, equivalents to the ministerial exception have been regularly held to apply to those employed by the church in whole or in part to teach its religious message. *See, e.g., Delle Fischer c/ Unacerf* (upholding the dismissal of a lecturer who failed to remain in communion with her protestant employer) (France); *Caldwell et al. v. Stuart et al.* (1984), 2 S.C.R. 603 (upholding the dismissal of a Roman Catholic teacher at a private Catholic school who had married a divorced man in a civil ceremony contrary to church dogma, and who did not give formal religious instruction, but led daily prayers in her classroom) (Canada); *Delgado Páez*, U.N. Human Rights Committee (the termination of a Catholic school teacher for advocating a liberation theology approach did not constitute a violation) (Colombia); Constitutional Court of Spain (38/2007), Feb. 15, 2007 (deciding against a religious teacher who was fired by the Catholic Church for not meeting the moral requirements of the church) (Spain).

The influence that teachers can have on impressionable youth being raised in a religious tradition has also led some foreign courts to uphold the dismissal of teachers by religious organizations even when the instructors do not directly teach religious doctrine. For example, the European Court of Human Rights upheld the dismissal of a kindergarten teacher because she participated in a church other than the national Protestant association that had hired her.[46] It is instructive that the European Court upheld the German court decisions, even though there was no evidence that her duties involved teaching religious doctrine or that her membership in another church would affect her teaching responsibilities.[47] Instead, it was enough that the Protestant church that hired her would have an interest in remaining credible in the eyes of the public and parents of the children attending the school and that the church sought to avoid any risk of unwanted influence on the children.[48]

Ministerial exception-type protections clearly also extend to religious leaders. Religious organizations could not function without personnel who govern or administer their various operations. Since religious organizations act through their human agents, they are dependent upon their personnel, especially those in leadership positions. The self-determination needed for the survival of all religious organizations requires the unfettered ability to choose governing spiritual and administrative leaders. The European Court of Human Rights has emphasized the impor-

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[46] *Siebenhaar*, App. No. 18136/02 (ECtHR).

[47] *Siebenhaar* at paras. 44-46.

[48] *Id.*

tance of autonomy in this area in cases rejecting attempts of states to interfere with religious leadership appointments.[49] It has also upheld national decisions applying ministerial exception-type protections allowing the termination of clergy.[50]

Foreign courts have extended ministerial-type protections in cases involving a broad array of other positions that have been important for the religious mission or ethos of the religious organization, including a public affairs spokesperson, a nurse, and a doctor. *See Obst v. Germany*, App. No. 425/03 (ECtHR, Feb. 3, 2010) (upholding the dismissal of a church public affairs director even though he did not hold the title of minister and his employment was not related to ministering to a specific congregation); *Neary v. The Dean of Westminster* (1999) IRLR 288 (upholding summary dismissal of an organist and concert secretary whose conduct undermined trust and confidence); Constitutional Court of Spain ruling 5/1981, February 13 (upholding a nurse's dismissal from a Catholic hospital because she criticized the religious order); *Rommelfanger v. Federal Republic of Germany*, App. No. 12242/86 (EComHR, Sept. 6, 1989) (ruling that it was constitutional to give notice of termination to a Catholic hospital physician who

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[49] *Serif*, App. No. 38178/97 (ECtHR) paras. 49-54 (State interference in the appointment of a mufti violates Article 9) and *Hasan and Chaush*, App. No. 30985/96 (ECtHR) para. 104 (Article 9 protects the right to organizational autonomy).

[50] Dudová and Duda v. Czech Republic, App. No. 40224/98 (ECtHR, Jan. 30, 2001) (rejecting the jurisdiction of secular courts in employment termination disputes involving members of the clergy).

publicly took a stance against the Church concerning the right of women to have an abortion).[51]

III. COMPARATIVE ANALYSIS OF RELIGIOUS AUTONOMY PROTECTIONS IDENTIFIES HAZARDS THAT FLOW FROM FAILURE TO AFFORD BROAD PROTECTION TO THE MINISTERIAL EXCEPTION.

While foreign experience supports the principles and values of the ministerial exception, it also provides important cautions in interpreting United States law. From the colonial era on, Americans have been consistently careful in rejecting the vestiges of British- and European-style establishment of religion.[52] While degrees of establishment existed in various forms in some of the colonies, and even after independence in a few states, laws "respecting an establishment of religion" were proscribed at the federal level with the adoption of the First Amendment;

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[51] Courts have questioned extending ministerial exception-type protections in a few cases where the positions were perceived as more peripheral to the organization's pastoral and teaching functions. Ontario Human Rights Commission v. Christian Horizons (2010) O.N.S.C. 2105 (CanLII), May 14, 2010 (ruling for a support worker at an organization ministering to individuals with developmental disabilities); Belgian Court of Cassation, Jan. 13, 1992, Triv. Trav. 1992, S. 225 (ministerial exception equivalent does not apply to teachers of secular subjects). *See also Schüth* (European Court found that Germany had not adequately balanced the privacy, family, and professional interests of an organist and choirmaster against religious autonomy rights).

[52] *See* John Witte, Jr. & Joel A. Nichols, *Religion and the American Constitutional Experiment* 1-3, 13-17, 21-37 (Westview Press 3d ed., 2011); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409.

and the insistence on institutional separation of church and state (and the concomitant protection of religious autonomy) had become axiomatic by the time of the adoption of the Fourteenth Amendment. The Great Awakening, the unprecedented religious diversity of the American populace,[53] the distance and spread of settlement and ready ability of Americans to move to new communities, the weakness and distance of formal ecclesiastical authority,[54] the influence of the Enlightenment on late-colonial elites,[55] and not least the War of Independence itself all engendered an irreversible break with British- and European-style establishment.[56] The First Amendment and the eventual disestablishment of religion in the various states were designed to bring the prior regime of established religion to an end, preventing both coerced support for religion and state control over the clergy and the church.

From the beginning, this Court's church autonomy cases have distanced themselves from European patterns that allowed judicial intervention in internal

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[53] Most Americans at the time of the Revolution were religiously fervent but not church-goers; adherents to diverse minority faiths, whose numbers were fueled by immigration and revival, outnumbered members of traditional established churches. Steven Waldman, *Founding Faith: How Our Founding Fathers Forged a Radical New Approach to Religious Liberty* 43-44 (Random House 2008).

[54] Perez Zagorin, *How the Idea of Religious Toleration Came to the West* 203 (Princeton Univ. Press 2003).

[55] *Id.*; McConnell, *supra* note 52, at 1430-1434.

[56] McConnell, *supra* note 52, at 1436; Philip Hamburger, *Separation of Church and State* (Harvard Univ. Press 2002) 89-92.

religious affairs. In *Watson v. Jones*,[57] the Court was faced with a question of first impression on an intra-church property dispute. British common law precedent used the "implied trust" doctrine, which held that in the absence of evidence of an express trust provision, property given to a church was held in implied trust for the benefit of individuals or groups that adhered to the same beliefs as the donors.[58] The Court reasoned that while the resulting "departure from doctrine" test may have been acceptable in the established church setting of Great Britain, it was not consistent with the spirit of religious freedom that prevailed in the United States. The Court emphasized that in the United States,

> [t]he right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned.[59]

Accordingly, the Court determined that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest . . . church judicatories to which the matter has been carried, the legal tribunals must accept such

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[57] 80 U.S. (13 Wall.) 679 (1871).

[58] Craigdallie v. Aikman, 4 Eng. Rep. 435 (1820); *see generally* H. Reese Hansen, *Religious Organizations and the Law of Trusts*, *in Religious Organizations in the United States: A Study of Identity, Liberty, and the Law* 279, 286 (James A. Serritella et al. eds., Carolina Academic Press 2005).

[59] *Watson*, 80 U.S. at 728-29.

decisions as final and as binding on them . . . ."[60] In subsequent cases, the Supreme Court has made it clear that

> First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice . . . . [T]he [First] Amendment . . . commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine.[61]

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[60] *Id.* at 727.

[61] *Mary Elizabeth Blue Hull*, 393 U.S. 440, 449. The continuing validity of the church autonomy cases was recognized in Employment Division v. Smith, 494 U.S. 872, 877, 887 (1990). It is important to understand why this is the case. The *Smith* case addressed the validity of general and neutral laws passed in the exercise of constitutionally authorized legislative powers. Such powers are broad, but they are not unlimited. As argued more specifically in the Brief for Petitioners, the confluence of free exercise, non-establishment, and expressive association principles in the federal Constitution respect a sphere of autonomy available to all religious communities. Significantly, the contours of this sphere are not dependent on the distinctive religious beliefs of any particular group. *See* Perry Dane, *The Varieties of Religious Autonomy, in* Robbers, *Church Autonomy*, 121-122. The Establishment Clause in particular poses a structural bar to government intrusion into internal religious affairs. *See* Carl Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J. Law & Politics 445 (2002); Carl Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 Iowa L. Rev. 1 (1998). Protection of this sphere places the internal affairs of religious communities beyond the reach of normal state regulatory powers. This is a sphere necessarily required if the state is to remain neutral in its dealings with all religious communities.

As detailed in Parts I and II, most foreign understandings of autonomy have come to more closely mirror United States protections. Nevertheless, there still remain a number of precedents in countries with limited traditions of freedom that illustrate the sorts of problems autonomy protections in the West have prevented. For example, national courts in Bulgaria and Greece have rejected the autonomy principles the United States articulated in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) by intervening in the appointment process for religious leaders.[62] In contrast, this Court has shown deference both over the dispute itself and over the procedures used by churches.[63] The European Court of Human Rights, in cases overturning the Bulgarian and Greek national courts has likewise emphasized religious autonomy is inconsistent with obligations of state neutrality.[64]

Strong protections for religious autonomy have served to protect United States courts from subtle pressures faced by governments and courts in other parts of the world to alter core structures, doctrines, and practices. In *Kedroff v. St. Nicholas Cathedral*,

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[62] *See* discussion of national court decisions in *Serif*, App. No. 38178/97 (ECtHR), and *Hasan and Chaush*, App. No. 30985/96 (ECtHR).

[63] *Serbian Eastern Orthodox Diocese*, 426 U.S. 696.

[64] *See Serif*, App. No. 38178/97 (ECtHR), and *Hasan and Chaush*, App. No. 30985/96 (ECtHR). Subsequent to the European Court's judgment in *Serif*, the applicant requested a reopening of his case in Greece, and on April 24, 2002 the Thessaloniki Appeal Court Council quashed the applicant's original conviction (Committee of Ministers Resolution ResDH(2005)88 of 26 October 2005, *available at* http://www.strasbourgconsortium.org/document.php?DocumentID=5524).

344 U.S. 94 (1952), despite Cold War pressures, the Court rejected a statute which could have transferred control of the Russian Orthodox Churches in New York from the Moscow hierarchy to that of the Russian Orthodox Church in America, holding that civil courts must defer to religious conceptions of their own organizational structures.

Other countries have found it much more difficult to resist political pressures. For example, as chronicled in *Metropolitan Church of Bessarabia v. Moldova*, App. No. 45701/99 (ECtHR, Dec. 13, 2001), Moldovan officials spent years refusing to give legal entity status to a breakoff Orthodox church that claimed allegiance to the Romanian hierarchy instead of the state-favored Russian one.[65] Similarly, in *Svyato-Mykhaylivska Parafiya v. Ukraine*, App. No. 77703/01 (ECtHR, June 14, 2007), Ukrainian officials refused to permit a local parish to change its affiliation from the more favored Moscow hierarchy to the breakoff Ukrainian one. Religious autonomy protections also work to protect government officials from undue pressure to support a given religious organization's legal positioning. In 1992, the President of Ukraine dismissed the official in charge of religious affairs because he refused to legitimize a legally questionable merger between two branches of the Orthodox Church and opposed the creation of a third branch.[66]

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[65] *See* Grégor Puppinck, correspondence with ICLRS (June 2011, document available upon request) (comparing Moldovan law to U.S. anti-discrimination law).

[66] *See* Gennadiy Druzenko, *Religion and the Secular State in Ukraine*, *in Interim Reports* 728.

At its extreme, lack of autonomy in the selection of religious leaders, teachers, and others performing ministerial functions becomes a facet of repressive state control of religious organizations. China bars foreign leadership of religious organizations;[67] it routinely interferes with or contests clerical appointments. The Vatican recently succeeded in the open appointment of a cardinal in Hong Kong because of limitations on Chinese governmental authority over religious practices in Hong Kong.[68] Roman Catholic leaders in the rest of the People's Republic of China are appointed by Chinese officials.[69] Many Middle Eastern countries control the appointment of the Muslim leadership in their countries.[70] In Turkey, all imams are employees of the state,[71] which in turn dictates the terms of their employment and the content of their sermons.

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[67] *See* U.S. State Department International Religious Freedom Report 2007: China, *available at* http://www.state.gov/g/drl/rls/irf/2007/90133.htm.

[68] *Id.* However, the PRC government subsequently warned the cardinal to avoid discussing political matters. *Id.*

[69] *Id.* There are some indications that the appointments are made after quiet consultation with the Vatican, but this modus vivendi remains shaky.

[70] Jakob Skovgaard-Petersen, *A Typology of State Muftis, in Islamic Law and the Challenges of Modernity* 81, 85-95 (Yvonne Yazbeck Haddad & Barbara Freyer Stowasser eds., AltaMira Press 2004). *See also* Steven J. Coffey, *Religious Freedom is a Growing Priority, in The Middle East Quarterly*, September 1997, 77-80.

[71] *See* Talip Kucukcan, *State, Islam, and Religious Liberty in Modern Turkey: Reconfiguration of Religion in the Public Sphere*, 2003 B.Y.U. L. Rev. 475, 502.

Algeria requires that all ministers register with and be approved by the government.[72]

United States constitutional principles, of course, represent a reaction against precisely these sorts of repressive controls of religious life. Robust protections of religious autonomy in countries with traditions of freedom have proved to be vital bulwarks against erosion of religious freedom around the world. The ministerial exception and its equivalents in foreign law have played a key role in ensuring the self-determination and authenticity of religious organizations and thus the pluralism of democratic societies. The European Court has emphasized the significance of religious autonomy for pluralism and how it lies at the center of religious freedom protections: "[T]he autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which [religious freedom] affords."[73] The ministerial exception and similar foreign protections ensure religious autonomy and pluralism by preventing governmental interference in an essential aspect of autonomy and religious self-determination—the selection, supervision, discipline and removal of those in important roles in carrying out a religious organization's mission.

CONCLUSION

Foreign law reaffirms the principles underlying the ministerial exception as a vital aspect of religious

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[72] Association Tunisienne de Droit Constitutionnel, *Droit, Pouvoir & Religion* (2010) 352, 353.

[73] *Metropolitan Church of Bessarabia*, App. No. 45701/99 (ECtHR) para. 118.

autonomy. To support religious freedom protections of self-determination and autonomy, the scope of the exception should apply to those who represent a religious organization in a variety of important duties including those who teach, govern, minister or have a meaningful role in carrying out the religious organization's mission. Finally, it is the importance of the duties performed, rather than the preponderance of time spent performing various employment duties that should determine the application of the ministerial exception.

Amicus respectfully submits that the Sixth Circuit erred in grounding its decision on the proportionate amount of time Respondent spent teaching spiritual and secular subjects. In doing so, the court's decision eviscerated the principles of autonomy and self-determination that are at the heart of the ministerial exception as understood and applied in both the United States and most leading countries throughout the world.

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APPENDIX

APPENDIX

The International Center for Law and Religion Studies is part of the J. Reuben Clark Law School at Brigham Young University. The Center focuses on questions of religion-state law and freedom of religion or belief around the globe. Center personnel co-organize or participate in 20 to 30 conferences in the United States and abroad each year, have published widely on religion-state issues, and have been called upon to consult on legislative proposals in nearly 50 countries. The Center hosts two websites that address religion-state matters: www.religlaw.org and www.strasbourgconsortium.org. The Center helps develop local expertise among scholars and government officials abroad through training and by facilitating professional relationships among these thought leaders. The Center's approach is comparative; it rallies expertise drawn from a worldwide network of collaborating scholars from many legal systems and religious traditions. The Center seeks to assist thought leaders and government officials working on religion-state issues to find enhanced, country-specific solutions that draw on international experience and comparative research.

AMICUS CURIAE BRIEF

No. 10-553

In the Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR INTERNATIONAL MISSION BOARD OF THE SOUTHERN BAPTIST CONVENTION, ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, COUNCIL OF HINDU TEMPLES OF NORTH AMERICA, MANDAEAN ASSOCIATION OF MASSACHUSETTS, AND INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the ministerial exception applies to a teacher at a religious elementary school who teaches the full secular curriculum, but also teaches daily religion classes, is a commissioned minister, and regularly leads students in prayer and worship.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

Amici, a diverse group of religious denominations and institutions described more fully in Appendix A, believe that religious groups must be able to choose their own leaders and exemplars without government interference, and that a robust "ministerial exception" is critical to religious liberty. *Amici* agree with Petitioner's constitutional analysis, and file this brief to emphasize that the ministerial exception is grounded in the original understanding of the First Amendment's Assembly and Free Exercise Clauses.

Consistent with the history discussed below, the lower courts have long recognized the risks inherent in regulating the relationship between a church—by which we mean religious organizations and houses of worship of all kinds—and its leaders and exemplars. A church's freedom to choose such individuals is critical to controlling its voice and maintaining its integrity. A church's standard bearers—including teachers who serve pastoral and devotional roles in religious schools—are the chief means by which it passes the faith to the next generation.

The ministerial exception thus safeguards religious freedom by requiring secular courts to abstain from certain employment disputes between religious institutions and key personnel. Those disputes are

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[*] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici* and their counsel, has contributed monetarily to the preparation or submission of this brief. See Rule 37.6.

sensitive, complex, and often dependent on matters of religious doctrine. Courts must tread carefully.

The approach of the Sixth Circuit, however, requires courts to resolve church employment disputes unless a court concludes that an employee's "primary duties" are religious. Pet. App. 16a. Under this approach, secular courts decide which of an employee's duties are "religious" and whether those duties are "primary." Further, this approach requires secular courts to resolve employment disputes that turn on matters of religious doctrine—even where, as here, resolution requires the court to determine whether the religious reason offered is pretextual or truly reflective of Church teaching.

Although *amici* represent a wide array of religious faiths, they are united in their opposition to this unpredictable and narrow "primary duties" test. The line between religious and secular duties "is hardly a bright one." *Corp. of Presiding Bishop* v. *Amos*, 483 U.S. 327, 336 (1987). And in light of the subtlety and complexity of the task, there is every reason to "be concerned that a judge would not understand [an institution's] religious tenets and sense of mission" (*ibid.*), particularly in cases involving religious minorities or less familiar traditions. Courts will frequently misunderstand the religious institutions they are called upon to judge (see, *e.g.*, *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 717-720 (1976)), or will make an earnest attempt at understanding, but find themselves in deep theological waters: What looks secular may not be; what looks unimportant may be indispensible.

Furthermore, religious institutions should not be forced to make spiritually significant employment de-

cisions in an atmosphere in which they can but guess which duties a court will find important enough to trigger protection. "Fear of potential liability" has an unfortunate chilling effect on "the way an organization carrie[s] out * * * its religious mission." *Amos*, 483 U.S. at 336.

The specter raised here—the government ordering a religious group to give a critical role to someone in whom the group has lost faith—implicates a range of constitutional principles that together demand a ministerial exception that is spacious rather than crabbed. Regulation that constrains religious groups' ability to choose their teachers and ministers not only raises "serious First Amendment questions," *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 504 (1979), it is contrary to the associational rights protected by both the Assembly Clause and the Free Exercise Clause. As explained below, that conclusion follows from practices during the Founding era, see, *e.g.*, *Nevada Comm'n on Ethics* v. *Carrigan*, No. 10-568, 564 U.S. __, slip op. 4-5 (June 13, 2011); *Marsh* v. *Chambers*, 463 U.S. 783, 787-791 (1983), and from this Court's prior decisions.

STATEMENT

This case is an employment dispute between Petitioner Hosanna-Tabor Evangelical Lutheran Church and School and a former teacher, Respondent Cheryl Perich. The Church is an ecclesiastical corporation and a member congregation of The Lutheran Church –Missouri Synod. Its school is dedicated to providing a "Christ-centered education" based on biblical principles. Pet. App. 3a-5a.

As a "called teacher," Perich was required to complete training in Lutheran theology and to receive a

declaration from a faculty committee that she was prepared for the ministry. *Id.* at 3a, 33a, 51a. Perich was appointed to her position by a vote of the Church's congregation, and she was issued a call by the Church to serve as a "commissioned minister." *Id.* at 3a-4a, 33a-34a. She could not be fired without cause, and she was subject to the same dispute resolution procedures as the Church's pastor. *Id.* at 3a, 51a.

Perich taught fourth grade. Her obligations included "integrat[ing] faith into all subjects," serving as a "Christian role model[]," teaching religion classes four days a week, leading her students in prayer and devotional exercises several times daily, and attending chapel services with her students every week. *Id.* at 4a-5a, 35a.

Just before the 2004-2005 school year, Perich became ill. With the school's support, she took medical leave, but subsequently she insisted on returning to work in the middle of the school year. *Id.* at 5a-8a, 35a-37a. Concerned about Perich's ability to safely supervise students—and about disruption to the students who had already changed teachers twice that year—the school asked Perich to continue her leave while they developed a plan for her return. *Id.* at 6a-7a, 35a-37a. Perich refused and reported to work even though the school had no job for her. When the school's principal suggested that Perich's conduct had jeopardized her continued employment, she threatened to sue. *Id.* at 8a, 38a.

Church teaching, however, provides that such disputes should be resolved within the Church rather than in court. The Church has therefore adopted bylaws providing a detailed procedure for internal dis-

pute resolution and appeals. See *id.* at 77a-104a. As a called teacher serving the Church as a commissioned minister, Perich had the right and the obligation to use these procedures. *Id.* at 51a.

Perich chose to reject that obligation. Accordingly, citing her "insubordination and disruptive behavior" and her "threat[s] to take legal action," the school board recommended rescinding her call. *Id.* at 38a, 9a. At the next congregational meeting, the Church's members voted to do so. *Ibid.*

Following her termination, Perich filed a charge with the Equal Employment Opportunity Commission (EEOC). The EEOC in turn sued the Church, alleging a single count of retaliation (not discrimination) under the Americans With Disabilities Act. Perich intervened, seeking a court order requiring the Church to reinstate her as a commissioned minister.

Noting that "the school values [its called teachers] as ministerial," the district court found that Perich "must be considered a ministerial employee." *Id.* at 50a-51a. As the court recognized, Perich's threats of litigation violated the Church's religious teachings regarding the need to resolve disputes internally, and applying the ministerial exception enabled the court to avoid scrutiny and "exploration of religious doctrine." See *id.* at 50a-52a.

The Sixth Circuit reversed. Although it acknowledged that other circuits disagreed with its approach, the court chose to "look at the function, or 'primary duties' of the employee," and to apply the ministerial exception if the employee's primary duties are religious in nature. *Id.* at 16a. Even though Perich was a commissioned minister, the court "look[ed] at the function of the plaintiff's employment position," ra-

ther than her status as a minister, to determine whether her position was "important to the spiritual and pastoral mission of the church." *Id.* at 17a (internal quotation marks and citation omitted). In the court's view, Perich's role—as a minister teaching the Church's children—was not sufficiently important.

The court of appeals further reasoned that proceeding with this case "would not require the court to analyze any church doctrine," because church policies "clearly contemplate that teachers are protected by employment discrimination and contract laws." *Id.* at 24a. The court did not explain how those laws can be reconciled with the Church's explicitly faith-based requirements not only for internal dispute resolution, but also for training, hiring, and retaining called teachers and commissioned ministers such as Perich.

SUMMARY OF ARGUMENT

The ministerial exception is grounded in the freedom of association protected by the First Amendment's Assembly and Free Exercise Clauses. As originally understood, these provisions protected the right to define and organize a religious group or association—including its right to choose its own leaders and teachers—without government interference. And subsequent decisions by this Court, in both religious and non-religious contexts, have confirmed this principle.

The ministerial exception should be understood and applied consistent with these provisions and the right to free association (and non-association) they provide. Religious groups have the right to choose, free from governmental interference, who will lead them and who will pass their faith onto the next generation. Congress has no authority to interfere. This

is the essence of the ministerial exception. And it precludes judicial review of a religious group's decision that a particular individual may no longer teach its children.

ARGUMENT

I. The Ministerial Exception Is Grounded In Associational Rights Protected By The Assembly Clause And This Court's Precedents.

As originally understood, the constitutional right of free assembly included the right to form groups—for political, religious, or even social purposes. By itself, this right strongly supports the ministerial exception, which is a special case that arises in part from rights enjoyed by any protected "assembly": deciding who will meet together, how they will define and organize themselves, and who their leaders will be.

Indeed, although the Court has not canvassed the history in detail, these rights have been recognized in a number of this Court's freedom of association precedents, *e.g.*, *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000); *Hurley* v. *Irish-Am. Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995); *Eu* v. *San Francisco Cnty. Dem. Cent. Comm.*, 489 U.S. 214 (1989), which affirm that the freedom "to speak, to worship, and to petition the government for redress of grievances" requires the "correlative freedom to engage in *group* effort toward those ends." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 622 (1984) (emphasis added). The Framers affirmatively guaranteed that freedom in the Assembly Clause. Thus, quite apart from the special character of associational rights in the context of religious groups (which we discuss in Part II), the historical record shows that such rights

are not purely derivative of speech; they are also supported by the history of free assembly.

A. History shows that the Framers adopted the Assembly Clause to protect the right to form groups, including for religious purposes.

The Assembly Clause was intended to protect the right of individuals to organize into groups—not just to physically assemble themselves, but also to *form* assemblies. This protection was understood to extend beyond groups seeking to engage in political speech, or for that matter any speech. Indeed, as the history shows, one central evil addressed by the Clause was government interference with *religious* assemblies.

1. The right to assemble is not dependent on the right to petition.

We begin with the text: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. This grammatical structure—from a serial disjunctive list to a conjunctive final clause—might suggest that the right to assemble is nothing more than a specific example of the right to petition. As discussed below, however, that reading is untenable in light of the history of the Amendment's drafting.

Even at a strictly textual level, the use of the final serial comma, after "assemble," serves to separate the Assembly Clause from the Petition Clause. If the Framers intended a single right—a right to assemble *in order to petition*, and no right to petition except by assembling—they would not have used a comma. See

John D. Inazu, *The Forgotten Freedom of Assembly*, 84 Tul. L. Rev. 565, 573-574 (2010) (Inazu); *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241-242 (1989) (when a phrase is set off by commas, it may suggest that the drafters intended for it to "stand[] independent of the language that follows").

This understanding of assembly as a stand-alone right is confirmed by how the Clause was revised by Congress before its adoption. The penultimate draft of the First Amendment included the "right of the people peaceably to assemble and consult *for their common good*, and to petition the government for a redress of grievances." S. Journal, 1st Cong., 1st Sess. 70-71 (1789) (emphasis added). Two States had proposed draft amendments providing for "a right peaceably to assemble together to consult for *the* common good."[1] The proposal James Madison brought to the House, however, reflected the broader formulation, *i.e.*, "their" common good. 1 Annals of Cong. 451 (Joseph Gales ed., 1790). And the House debates reflected the Framers' awareness that a right of assembly that would protect only mainstream groups who supported the social order—"*the* common good" rather than "*their* common good"—would be of slight value. Inazu 572.

Ultimately the entire phrase, "for their common good," was taken out of the Clause. This happened without explanation when the Senate revised the draft Amendment to include the Religion Clauses. S. Journal, 1st Cong., 1st Sess. 77 (1789), Inazu 573.

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[1] 3 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 658-659 (Jonathan Elliot ed., 1836) (Elliot) (Convention of Virginia); see also 4 Elliot 244 (Convention of North Carolina).

Given the earlier conflict over "the common good" versus "their common good," this omission is best understood as intended to broaden the Clause, not as reducing the right of assembly to a mere handmaiden of the right to petition.

In sum, the historical record confirms that the right to assemble—including, as discussed below, the right to assemble for religious purposes—was viewed as a stand-alone right.

2. The Assembly Clause is not redundant of the Speech Clause.

The independent significance of the Assembly Clause is further confirmed by the House debates, which show that the Framers considered and rejected the notion that the Assembly Clause added nothing to the freedom of speech.

One House member, Theodore Sedgwick, opposed the Clause because, in his view, assembly was "a self-evident, unalienable right which the people possess," and a necessary component of free speech; therefore, it would be "derogatory to the dignity of the House to descend to such minutiae." 1 Annals of Cong. 759 (1790). Sedgwick thus moved to strike the Clause's reference to assembly, insisting that there was no need to stoop to "trifles" such as assembly—or, he added, whether "a man should have a right to wear his hat if he pleased." *Id.* at 760.

But this view did not carry the day. Elbridge Gerry "conceived [assembly] to be an essential right," and John Page distinguished "the power of assembling" from "every other privilege contained in the clause." *Ibid.* The House defeated the motion to strike "by considerable majority" (*id.* at 761), thus affirming

that assembly meant more than simply speech, and was far from a "trifle."

3. The Assembly Clause protects religious assembly.

The House debates also reveal the Framers' specific understanding that the right of assembly would protect not only political expression, but religious assemblies. Addressing Sedgwick's facetious reference to hat-wearing, Page noted that "such rights have been opposed, and a man has been obliged to pull off his hat when he appeared before the face of authority." *Id.* at 760. Page thus "brought forward, without needing to name it, one of the great examples of judicial tyranny founded on pretended law"—the trial of William Penn. Irving Brant, *The Bill of Rights: Its Origin and Meaning* 62 (1965) (Brant).

Penn's religious group, the Society of Friends, also known as the Quakers, had come under heavy persecution in seventeenth-century England for failing to adhere to the tenets of the Anglican Church. Quakers "found their meeting-houses occupied by guards of watchmen, but met outside in the court or the open street." William C. Braithwaite, *The Second Period of Quakerism* 68 (1919).

It was there on the street that Penn, preaching to a group of fellow Quakers, was arrested. Penn and another Quaker, William Mead, were charged with unlawful assembly. Brant 56. Quakers believed that taking off their hats in public both degraded the Quaker and "unduly exalt[ed]" the recipient; they took off their hats for God, not men. See Joseph Barker, *Life of William Penn: the Celebrated Quaker and Founder of Pennsylvania* 27-28 (1847). As Penn and Mead entered the courtroom, however, an officer

removed their hats. The court ordered the officer to put the hats back on—and then ordered Penn to take his off again. Penn refused and was fined. *Id.* at 44.

After an outburst in which he demanded to know what law he had violated, Penn spent the rest of the trial in the bale-dock, hidden from view. Brant 58. At the trial's conclusion, the jury was instructed that if it found that Penn had preached in the street, he must be convicted. *Ibid.* But the jury did not comply: Although it found Penn "[g]uilty of speaking on Gracechurch street," it refused to find an unlawful assembly. *Id.* at 59. The jurors were kept overnight, but returned the same verdict the next morning. *Id.* at 60. The jury returned identical verdicts twice more, and then, after another overnight deliberation, simply found Penn not guilty—at which point the jury was imprisoned for failing to obey the judge's order. *Ibid.* Penn, meanwhile, remained in custody for his hat-wearing.

A pamphlet later penned by Penn and Mead—*The People's Ancient and Just Liberties, asserted, in the Trial of William Penn and William Mead at the Old Bailey, 22 Charles II 1670, written by themselves*—was widely read and influential in the colonies. And because the story was so well-known to lawyers and legislators, Page's "mere reference to it" during the House debate "was equivalent to half an hour of oratory." Brant 55-56, 61.

By invoking this episode to illustrate the necessity of the Assembly Clause, Page confirmed not only that the right to assemble could not be taken for granted, but also that "the right of assembly under discussion in the House encompassed more than meeting to petition for redress of grievances: Penn's ordeal had noth-

ing to do with petition; it was an act of religious worship." Inazu 576. This colloquy thus confirms that the Assembly Clause protects both political *and* religious assemblies.

4. The Assembly Clause protects the general right to form groups.

Finally, the existence of, and reaction to, dissident assemblies in the early days of the Republic confirm that the Assembly Clause protects a general right to form and organize groups. That right could easily have wilted in the crucible of a fragile new Nation. Instead, it survived and flourished. As Alexis de Tocqueville would later observe: "In no country in the world has the principle of association been more successfully used or applied to a greater multitude of objects than in America." Alexis de Tocqueville, 1 *Democracy in America* 198 (Bradley ed., 1954).

The right to form groups was put to the test during the Washington administration, when citizens began organizing groups that opposed the Government's Federalist policies. Known as Democratic-Republican societies, these groups depended on—and often proclaimed—their right to assemble. Notably, although the societies were built around political ideas, they did not limit their gatherings to political discussions. They also held fairs, festivals, and parades. See Simon P. Newman, *Parades and the Politics of the Street: Festive Culture in the Early American Republic* 2 (1997).

Opposition to the societies, which excluded outsiders, was fierce. That opposition, however, was based on the Federalist view that the will of the people should be exercised through governmental institutions, and that "a group opposing the decisions of

those institutions necessarily spoke only for a self-interested minority or 'faction.'" Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic*, 82 N.C. L. Rev. 1525, 1541-1549 (2004) (Chesney). That is, the Federalists opposed sedition, not assembly.

Although the societies and their defenders argued that collective opposition was good policy, they also fiercely maintained their legal right to exist. See Chesney 1549-1550. "The right to association in Democratic Societies has been questioned by some," wrote one society, "but if we have not this privilege, by what constitutional text will other associations be justified? If we as a number have not the right to speak our sentiments, by what political logic will the right of an individual be defended?"[2] Another society declared it "the undeniable right of all freemen and citizens to form societies, to consult among themselves, and to recommend such means as shall appear best adapted to support public peace, and to promote general benefit."[3] A third offered this challenge: "I dare the Legislature of the United States to pass a law prohibiting the Democratic Society in the City of New-York: Yes, Sir, I repeat it—they dare not even

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[2] German Republican Society of Philadelphia, *Address to the Free and Independent Citizens of the United States* (Dec. 29, 1794), in *The Democratic-Republican Societies, 1790-1800: A Documentary Sourcebook of Constitutions, Declarations, Addresses, Resolutions and Toasts* 61-62 (Philip S. Foner ed., 1976) (Foner).

[3] Franklin or Republican Society of Pendleton County, South Carolina, *Resolutions Adopted on a Variety of Subjects* (June 30, 1794), in Foner 396.

make the attempt. * * * I will tell you why they dare not do it—Because, Sir, they have too much virtue—too much regard for our happy, our glorious, constitution, to attempt passing so base, so tyrannical, so unconstitutional, an act."[4]

The societies drew President Washington's ire, but others initially persuaded him not to move against them. Most notably, Thomas Jefferson (then Secretary of State) argued to Washington that attempting to proscribe a society would backfire, because "*multitudes would join it merely to assert the right of voluntary associations.*" Thomas Jefferson, *The Anas* (notes from cabinet meeting held Aug. 2, 1793), in 1 *Writings of Thomas Jefferson* 380 (Albert Ellery Bergh ed., 1905) (emphasis added).

The Whiskey Rebellion, however, provided a political climate in which the societies were susceptible to attack. During the summer of 1794, citizens in western Pennsylvania engaged in organized, and violent, resistance to an excise tax. Washington directed a federal show of force that ended the insurrection. In his 1794 Address to Congress, however, the President "made one serious mistake": He not only condemned the Rebellion, he laid it at the societies' feet. David P. Currie, *The Constitution in Congress: The Federalist Period 1789–1801* 190 (1997). Specifically, Washington accused "certain self created societies" of encouraging the insurrection. See 4 Annals of Cong. 788 (1794). James Madison called this attack "perhaps the greatest error of [Washington's] political life." James Madison, Letter to James Monroe (Dec.

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[4] A Member of the Democratic Society of the City of New York, Letter to New-York Journal (June 18, 1794), in Foner 165-166.

4, 1794), in 15 *Papers of James Madison* 405-406 (Charles F. Hobson et al., eds., 1985).

Following this address, the House extensively debated whether the societies should be censured. See 4 Annals of Cong. 899-912, 935-948.[5] The issues debated included whether the societies' rhetoric had "stimulated the insurgency," whether censure would "have any practical significance," and whether "Congress even ha[d] authority to comment on the societies." See Chesney 1562. But critically for present purposes, the House also discussed whether "the societies ha[d] a constitutional right to exist." *Ibid.* Both sides of the debate were able to fully air their views. And as this Court has recognized, "evidence of opposition to a measure * * * infuses [a historical argument] with power by demonstrating that the subject was considered carefully and the action not taken thoughtlessly." *Marsh*, 463 U.S. at 791.

Initially, no less a figure than the First Amendment's principal draftsman, James Madison—joined by Thomas Scott and over Sedgwick's objection—drafted a reply to Washington's address that, conspicuously, did not address the societies. See Irving Brant, *James Madison: Father of the Constitution 1787-1800* 417-418 (1950); Chesney 1562-1563.

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[5] The Senate, controlled by Federalists, quickly echoed Washington's censure. See 4 Annals of Cong. 794 (1794). In this context, the House debate (and its resolution in favor of the societies) is particularly telling because it was reported, blow by blow, in the papers, and the House was acutely aware that the country was following its deliberations. At stake was whether the House's prestige would be added to Washington's in condemning the societies. See Chesney 1562-1564, 1566.

When the draft was considered by the whole chamber, however, Thomas Fitzsimons proposed an amendment stating that the House could not "withhold our reprobation of the self created societies * * * which, by deceiving and inflaming the ignorant and the weak, may naturally be supposed to have stimulated and urged the insurrection." 4 Annals of Cong. 899 (1794).

In opposition to this proposed attack, William Giles emphasized its religious and other implications: "Associations of this kind, religious, political, and philosophical, were to be found in every quarter of the Continent. The Baptists and Methodists, for example, might be termed self-created societies. The people called the Friends were of the same kind. Every pulpit in the United States might be included in this vote of censure, since, from every one of them, upon occasion, instructions had been delivered, not only for the eternal welfare, but likewise for the temporal happiness of the people." *Id.* at 900. Apart from legal options such as treason prosecutions (if truly warranted), Giles argued, "[a]ssociations of this kind" should be left "unmolested." *Ibid.*

Others disagreed, but even the proponents of censure did not suggest that the societies were illegal, and few took issue with the right to assemble (as distinguished from the right to organize acts of violent dissent). Fisher Ames, for example, insisted: "The right to form political clubs has been urged, as if it had been denied. It is not, however, the right to meet, it is the abuse of the right after they have met, that is charged upon them." *Id.* at 922. Men who join such clubs "become bad citizens. If innocence happens to stray into such company, it is lost." *Id.* at 930. William Smith similarly dared anyone to "com-

pare a regular town meeting" to "the nocturnal meetings of individuals, after they have dined, where they shut their doors, pass votes in secret, and admit no members into their societies, but those of their own choosing." *Id.* at 902. Even so, he too emphasized that the "question before the House was not whether these societies were illegal or not, but whether they have been mischievous in their consequences." *Id.* at 902. William Vans Murray likewise saw censure as the House's "advice," and supported it even though he opposed abolishing the societies. *Id.* at 906. And Samuel Dexter, although "not for making laws against [the societies]," believed "the House were in the practice of expressing their sentiments on matters of that sort." *Id.* at 910.

On the fourth day of this extended debate, Madison spoke for the first time. He contended that "an action innocent in the eye of the law could not be the object of censure to a Legislative body." *Id.* at 934. He "knew of nothing in the proceedings of the Legislature which warrants the House in saying, that institutions confessedly not illegal were subjects of Legislative censure." *Id.* at 935. In response, though castigating associations who instigate "the blackest crimes," Dexter noted that "Mr. Madison had mentioned religious societies," and Dexter agreed, "they clearly could not be [prohibited by law]." *Id.* at 937. Thomas Carnes added his "hope" that "the day will never come, when the people of America shall not have leave to assemble, and speak their mind." *Id.* at 941.

Ultimately, the societies' defenders prevailed (although the President's censure was too much for the societies to survive, see Inazu 581). Fitzsimons' proposed response "was watered down by a large majori-

ty," and "there was no disparagement of the right to associate." Currie 192. Instead, the House passed a statement that was silent on the "self-created societies" that Washington had attacked, and vaguely referred only to "combinations of men" who had incited the Whiskey Rebellion. 4 Annals of Cong. 947-948 (1794).

Understandably, the societies saw this as a victory for the right of association. As one society put it, "in all probability, [the House's actions] fixed an eternal barrier, that will forever prevent another [attack] being made, and have erected a great sea mark by which our state pilots may avoid in [the] future, the rock upon which they lately lay nearly shipwrecked."[6] That "rock," of course, was the idea that the formation of groups such as the societies could be regulated by the government.

Indeed, very few Representatives believed that Congress had any right to do so. Those in favor of censure repeatedly disclaimed any intent to outlaw them. And those who believed that Congress could outlaw them pointed to their *acts* (*e.g.*, their alleged involvement in the Whiskey Rebellion), rather than their structure or meetings. Essentially, the argument in favor of curtailing the societies was that they had not assembled "peaceably."

The historical record thus reveals an understanding that citizens have a general right—protected by the Assembly Clause—to join together in groups for any peaceful purpose and to exclude others from their

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[6] Patriotic Society of County of Newcastle, Delaware, *Address to the People of the United States* (Jan. 8, 1795), in Foner 332.

assemblies. And that record demonstrates that this right was always understood to extend to groups religious as well as political.

B. The principles embodied in the historical understanding of free assembly are reflected in this Court's "freedom of association" precedents.

Just as the Speech Clause protects the incidents of speech (for instance, publishing a pamphlet), the Assembly Clause protects the incidents of assembly. And, although this case does not present the issue, this includes incidents that may be minimally or only secondarily expressive. Indeed, if only *expressive* assembly were protected, the House presumably would have accepted Sedgwick's proposal to strike the First Amendment's protection for assembly as redundant of its protection for speech.

Consistent with these principles, a long line of this Court's cases protects "freedom of association." Although these cases do not expressly invoke the history outlined above, they reflect the same understanding of the First Amendment—that it protects a right to associate for the purpose of speaking (or exercising religion) collectively, and that groups assembled for such purposes have control not only over their messages, but over their membership and organization.

1. Under these decisions, an association has a right to select members and leaders who share the association's beliefs—and to exclude those who do not. Indeed, as this Court has recognized, "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members that it does not desire." *Roberts*, 468 U.S. at 623.

And "freedom of association plainly presupposes a freedom not to associate." *Dale*, 530 U.S. at 648 (quoting *Roberts*, 468 U.S. at 623) (alteration marks and ellipses omitted); see also *Rumsfeld* v. *Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47, 69 (2006) (associational rights are implicated by rules that "directly interfere with an organization's composition").

This Court has frequently applied these principles to political parties. In that context, the Court has recognized that groups have a right not only to define their membership,[7] but "to identify the people who constitute the association, and to select a standard bearer who best represents [their] ideologies and preferences." *Eu*, 489 U.S. at 224 (internal quotation marks and citation omitted); also cf. *Mayor of Phila.* v. *Educ. Equal. League*, 415 U.S. 605, 615 (1974) (recognizing the problems involved in ordering a mayor to exercise his powers of appointment in a nondiscriminatory fashion).

These principles, however, are not limited to political parties. In *Hurley*, for example, the Court upheld the right of parade organizers to exclude a group with

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[7] *E.g.*, *New York State Bd. of Elections* v. *Lopez Torres*, 552 U.S. 196, 202 (2008) ("A political party has a First Amendment right to limit its membership as it wishes"); *Calif. Dem. Party* v. *Jones*, 530 U.S. 567, 574 (2000) (holding that a party can limit voting in the party primary to party members, in part because "a corollary of the right to associate is the right not to associate"); *Dem. Party* v. *Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981) ("[T]he freedom to associate for the common advancement of political beliefs necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.") (internal quotation marks and citation omitted).

a dissenting message, "just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." 515 U.S. at 581. Similarly in *Dale*, the Court confirmed that "forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." 530 U.S. at 648.

2. The Church here did essentially the same thing as the groups in *Hurley* and *Dale*: It fired (*i.e.*, excluded) a commissioned minister who violated an important tenet of the organization. Although Perich characterizes her firing as retaliation for threatening suit under the ADA, in fact she was fired for what the Church concluded was *un-Christian* behavior—for insubordination and failing to participate in the Church's internal dispute resolution process.[8] See also *Calif. Dem. Party*, 530 U.S. at 577 (rejecting a rule that "forces political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival").

In essence, the Church concluded that Perich's conduct impeded, and that she was not sufficiently

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[8] As detailed in the Church's bylaws, that process is explicitly intertwined with Church doctrine and Scripture. See Pet. Br. 54; Pet. App. 77a-78a; see also 1 *Corinthians* 6:1-7 ("If any of you has a dispute with another, dare he take it before the ungodly for judgment instead of before the saints? * * * The very fact that you have lawsuits among you means you have been completely defeated already.").

committed to, the Church's religious mission. Such judgments lie at the heart of any religious assembly or association. As Justice Brennan observed, "Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is * * * a means by which a religious community defines itself." *Amos*, 483 U.S. at 342 (concurring opinion). Thus, to deny the Church the ability to fire Perich for what it viewed as conduct inconsistent with its mission would be to deny the Church the very ability to "define itself."

Moreover, just as the Boy Scouts held out their leaders as exemplars to boys, their families, and the broader community, Perich's duties as a called teacher specifically included serving as a "Christian role model[]" to her students and "integrat[ing] faith into all subjects." Pet. App. 5a, 35a. And just as the Scouts could not be forced to accept a leader who, in their view, was acting in a manner contrary to their message (*Dale*, 530 U.S. at 661), the Church had every right to protect its message and integrity by releasing Perich. See also *Eu*, 489 U.S. at 231 n.21 ("By regulating the identity of the parties' leaders, the challenged statutes may also color the parties' message and interfere with the parties' decisions as to the best means to promote that message."). "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." *La Follette*, 450 U.S. at 122 n.22 (quoting Laurence H. Tribe, *American Constitutional Law* 791 (1978)).

3. The Church in this case is entitled to protection that extends beyond what this Court has recog-

nized in the expressive associations context. First, by its terms and its history, the Assembly Clause protects the right to assemble *regardless* of the expressive purposes of such assembly. Second, as we explain in Part II, religious groups enjoy an additional layer of protection under the Free Exercise Clause. Unlike a pure expressive association case, therefore, applying the ministerial exception does not require "weighing" the burden on the Church's message imposed by Perich's suit. Compare *Dale*, 530 U.S. at 658-659 ("in [associational freedom] cases, the associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other"), with, *e.g.*, *Milivojevich*, 426 U.S. at 711 (reaffirming the "binding" effect of religious authorities' decisions in "cases of ecclesiastical cognizance") (citation omitted).[9]

Indeed, in many ways, religious assembly is the most highly protected form of all: The right of religious groups freely to organize themselves was a core feature of the First Amendment's original design. This is manifest not only in the history of the Assembly Clause and the logic of this Court's freedom of association decisions, but also in the Free Exercise Clause, to which we now turn.

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[9] Even if the Court's expressive association precedents did stand alone, thus requiring that the government's interest be weighed against the Church's expression, those precedents would foreclose Perich's claim. See, *e.g.*, *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-432 (2006) (under RFRA, the Government must prove not just a compelling interest in general, but a compelling interest in applying its policy in a particular case).

II. The Ministerial Exception Is Also Grounded In The Free Exercise Clause, Which Further Protects An Associational Right Of Religious Groups To Control The Internal Leadership Of Their Organizations.

The ministerial exception's protection for a religious group's right to choose its leaders and exemplars is deeply rooted in the history of the Free Exercise Clause—from the writings of John Locke, to Britain's wars of religion, to the experience of the American colonists. And this Court's decisions confirm that a church's freedom to choose such leaders lies at the core of free exercise.

A. Disputes about church leadership were a key inspiration for the First Amendment.

1. Locke was a chief inspiration to the Framers and supplied "the background political philosophy of the age." *City of Boerne* v. *Flores*, 521 U.S. 507, 540 (1997) (Scalia, J., concurring in part). Like this Court's later decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), Locke rejected individual religious exemptions from generally applicable laws. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1433-1435 (1990) (McConnell). And since *Smith*, the historical debate has focused largely on whether the Framers had a broader vision of free exercise than Locke. Compare *City of Boerne*, 521 U.S. at 538-542 (Scalia, J., concurring in part), with *id.* at 548-564 (O'Connor, J., dissenting). But no such debate is necessary concerning the ministerial exception, as it was already fully formed in Locke's own thought.

Locke was emphatic that religious institutions must be free to control their message and leadership as they see fit. Locke thus distinguished between the conduct of *individuals* and the institution of the *church*, which he defined as a "voluntary society of men" that cannot "be tied with any other bonds but what proceed from the certain expectation of eternal life." John Locke, *A Letter Concerning Toleration* 14-15 (Huddersfield 1796) (1689) (Locke). Because "the joining together of several members into this church-society * * * is absolutely free and spontaneous," Locke explained, "it necessarily follows, that the right of making [its] laws can belong to none but the society itself." *Id.* at 15-16.

Consistent with these principles, Locke expressly endorsed churches' right to choose their own members and leaders. This right included the unencumbered freedom to disassociate with anyone, for "no church is bound, by the duty of toleration, to retain any such person in her bosom." *Id.* at 19. The "right of * * * excommunication" was a "fundamental and immutable right," ensuring that a church "has power to remove any of its members who transgress the rules of its institution." *Id.* at 21.

This ability to remove "any" of a church's members necessarily includes the right to excommunicate church leaders or teachers who the church believes have "transgress[ed] the rule of its institution." And that authority implies that the church could choose to discipline a leader or teacher in some lesser manner—such as relieving the person of leadership or teaching responsibilities. Also cf. *Bouldin* v. *Alexander*, 82 U.S. (15 Wall.) 131, 139-140 (1872) (courts "cannot decide who ought to be members of the church").

Thus, although he was willing to constrain free exercise in other ways, Locke saw the institutional independence of the church in its leadership and membership decisions as an irreducible minimum of free exercise. And this fundamental freedom included the right both to choose and to remove leaders and teachers without state interference.

2. Locke's strong support for churches' autonomy over personnel was influenced by the "great * * * divisions" over the "order of rulers in the church" that had long preoccupied Britain. Locke 16. And just as it influenced Locke, the bloody history of religious strife in Britain loomed large in the minds of the Framers.

Notably, Britain's wars over religion were not only wars over articles of religious faith; they were also—and perhaps predominantly—wars over the leadership structure of the church. And as Locke and the Framers recognized, the only acceptable resolution was to let churches decide such leadership matters for themselves.

A leading source of religious strife during Locke's era involved clashes between Episcopal and Presbyterian views of "church polity"—the church's internal governance structure. Episcopal polity, associated with the Roman Catholic and Anglican churches, called for placing ecclesiastical authority principally in bishops. In contrast, Presbyterian polity, inspired by the Reformation and associated with the Puritans and many Protestant churches, called for governance by assemblies of elders—*i.e.*, "presbyters."

These opposing views of church polity formed key lines of demarcation in the English religious wars of the seventeenth century. King James I "persistently

favoured the [Episcopal] tendency in England." Felix Makower, *The Constitutional History and Constitution of the Church of England* 71 (1895) (Makower). And particularly in Scotland, where Presbyterianism was then ascendant, James worked "to transform slowly the presbyterian into an episcopal constitution." *Ibid.* Such challenges to the Presbyterian view engendered opposition from parliament, and "[w]ith more or less violence [disputes] continued to rage during the whole of James's reign." *Ibid.*

By the time Charles I took the throne, "the quarrel between king and parliament grew fiercer year by year" and "religious antagonism was an unceasing influence." *Id.* at 75. In 1640, Charles dissolved parliament and required all clergy to swear an oath against alteration of the church's existing Episcopal structure. *Id.* at 76. In addition to increasing the power of Anglican bishops in England, Charles "tried to impose Anglican bishops and establishment laws on Scotland." John Witte, Jr., *Prophets, Priests, and Kings: John Milton and the Reformation of Rights and Liberties in England*, 57 Emory L.J. 1527, 1532 (2008). The result: "the Scots acting in concert with a part of the English opposition marched into England." Makower 77; see also Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. Rev. 1385, 1412 (2004).

Charles ultimately yielded to the opposition, and a reconstituted parliament exacted revenge. They impeached the chief minister of the crown for high treason, condemned him by a bill of attainder, and executed him. Makower 77. Newly emboldened, the Presbyterian dissidents also began dismantling the church's internal structure, impeaching many of the

bishops for high treason. *Id.* at 78-79. By 1642, the struggle erupted into all-out civil war.

The Presbyterians prevailed. Soon the bishops were replaced by presbyters, and the "episcopal constitution of the church, as it existed in England and Wales, was declared * * * to be abolished." *Id.* at 81.

But wars over the church's structure did not end. Rather, the fault lines shifted from a clash between Episcopal and Presbyterian polities to a dispute between the Presbyterians and the Congregationalists. Backed by Oliver Cromwell and the English army, the Congregationalists repudiated central church authority. The Congregationalist dissenters prompted yet another civil war, ultimately defeating the Presbyterians and convicting Charles I of high treason. *Id.* at 82-83.

Upon Cromwell's death and Charles II's ascension to the throne in 1660, the disputes took a backward turn. The Episcopalians regained a majority in Parliament, restoring the bishops and "declar[ing] that all ministers who had been ordained otherwise than by a bishop and who should not obtain episcopal ordination within a short time were *ipso facto* deprived of their offices." *Id.* at 89-90. The period was "characterized by extreme intolerance" toward the Protestant groups that had espoused Presbyterian and Congregationalist polities. *Id.* at 91.

Eventually, wars over the Church of England's structure gave way to peace. One term of this peace —set forth in the Toleration Act of 1689—was that the various Protestant groups be allowed to "build up their own organizations outside the [established] church." *Id.* at 95-96. Although Roman Catholics and others remained persecuted and the established

church officially favored, this was a landmark moment in the history of religious freedom. And it established the core principle of church autonomy over its own leadership—the very principle that lies at the heart of the ministerial exception today.

3. This history was not lost on the Framers, who reflected upon the "[t]orrents of blood [that] have been spilt in the old world" from religious strife. James Madison, *A Memorial and Remonstrance* 2 (1785). Indeed, the colonies too had suffered repeated conflict over the selection of ministers, which became further impetus for the Free Exercise Clause. See generally McConnell 1421-1437.

Even some of those who stood to benefit from state interference opposed it. The Presbyterian church of Virginia, for example, rejected an offer of government support for its ministers because such support would have "a tendency to render them independent, at length, of the churches whose ministers they are." *Memorial of the Presbytery of Hanover* (Oct. 1784), in *American State Papers Bearing on Sunday Legislation* 108 (Willard Allen Colcord ed., rev. 1911). "We hope that no attempt will be made," the church explained, "to interfere in the internal government of religious communities." *Id.* at 111.

This experience undoubtedly influenced the Framers. Even before the First Amendment's drafting, the notion of institutional autonomy over church leadership found expression in state constitutions specifically guaranteeing to religious *groups*—not just individuals—the right to free exercise. See Br. for Evangelical Covenant Church, et al. 15-16. And once the First Amendment was ratified, the right of religious groups to select their own leaders was understood to

be one of the rights protected by the Free Exercise Clause. As James Madison would later explain, under "the scrupulous policy of the Constitution"—which "guard[s] against a political interference with religious affairs"—"the selection of ecclesiastical individuals" and the appointment of church "functionaries" is an "entirely ecclesiastical" matter left to the church's own judgment. James Madison, Letter to Bishop John Carroll (Nov. 20, 1806), in 20 *Rec. Am. Catholic Hist. Soc'y* 63-64 (1909).

Moreover, even if Madison's statement "did not in fact espouse the broad principle of affirmative accommodation" rejected in *Smith*, see *City of Boerne*, 521 U.S. at 542 (Scalia, J., concurring in part), it strongly supports the basic principle of church autonomy over leadership. For that and the other reasons explained above, the First Amendment's protection for free exercise necessarily encompasses a broad protection for the autonomy of religious associations to choose those who will lead and represent them.

B. The Court has long protected the right of religious associations to control their organizational leadership.

Consistent with this history, this Court has long protected the right of religious groups to choose their own leaders without government interference. See, *e.g.*, *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 119 (1952); *Milivojevich*, 426 U.S. at 720; *Gonzalez* v. *Roman Catholic Archbishop*, 280 U.S. 1, 17-18 (1929); *Bouldin*, 82 U.S. (15 Wall.) at 139-140. The ministerial exception is but one aspect of this established freedom.

1. The right of institutional control over church leadership is fundamentally different from an indi-

vidual's conscientious objection to a generally applicable law. That is because state control of religious leadership decisions treads on "the free exercise of an ecclesiastical right, the Church's choice of its hierarchy." *Kedroff*, 344 U.S. at 119. *Smith* itself recognized this right, noting that government may not "lend its power to one or the other side in controversies over religious authority." *Smith*, 494 U.S. at 877. And in so doing it echoed the Court's precedent that it "is the function of church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them." *Milivojevich*, 426 U.S. at 711 (citation omitted); accord *Gonzalez*, 280 U.S. at 16-17.[10]

Alone or in combination with the other constitutional principles discussed above and in Petitioner's brief, this imperative—to protect religious groups' right to exercise their faith through leaders and exemplars of their own choosing—compels reversal of the decision below. Clergy and religious leaders are a church's "lifeblood," the "chief instrument by which [it] seeks to fulfill its purpose." *McClure* v. *Salvation Army*, 460 F.2d 553, 558-559 (5th Cir. 1972). And the ministerial exception plays a vital role in ensuring that churches and religious organizations retain control over the selection and dismissal of their leaders.

Among those leaders are teachers in a church's religious schools. In light of the "admitted and obvious fact that the *raison d'être* of parochial schools is the

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[10] Although disputes involving church property generally can (and must) be resolved by civil courts, such disputes raise distinct concerns and may be resolved by "neutral principles of law." See generally *Jones* v. *Wolf*, 443 U.S. 595, 602-605 (1979).

propagation of a religious faith," teachers play a "critical and unique role * * * in fulfilling the mission of a church-operated school." *Catholic Bishop*, 440 U.S. at 501, 503 (citation omitted).

2. The truth of that statement is amply illustrated by this case. The stated purpose of the Church's school is to provide a "Christ-centered education" based on biblical principles. Pet. App. 4a-5a. Overt religious instruction is only one way the Church advances that purpose: it also expects its teachers to serve as "Christian role models" and to "integrate faith into all subjects." *Id.* at 5a, 35a. To that end, the Church has built its school around "called teachers" like Perich—trained ministers who have been "called" to serve God and the Church. See Pet. Br. 4-6 (explaining difference between lay and called teachers).

In this capacity, Perich led her class in prayer, conducted devotional exercises, taught religion classes, took her students to school-wide chapel services, and occasionally led those services herself. Pet. App. 4a. As a called teacher, Perich pledged "[t]o exemplify the Christian faith and life" and "to live in Christian unity with the members of the congregation and co-workers." J.A. 48. The history and precedent discussed above confirm the Church's right to choose, discipline, and dismiss individuals filling a role so vital to the Church's exercise of its faith.

3. The Sixth Circuit, however, concluded that Perich spent most of her day "teaching secular subjects." Pet. App. 20a. The court thus made *its own* judgment that Perich's so-called secular activities were more important to her role than the religious ones. That is a debatable theological judgment, to say the least,

and in all events a risky one for *the state* to make. Embedded within the judgment is a bias foreign to many religious faiths—that the quantity of devotional activity matters more than its quality.

The Sixth Circuit's judgment is also troubling for assuming that Perich's activities were "secular." Pet. App. 20a. This contrasts starkly with the way many religious traditions understand their faith—not to mention the good-faith description of Perich's position by her own employer. Only the most naïve view of religious schooling assumes that religious teachers model their faith only by lecturing about God.

In short, in operating its school and choosing its teachers, the Church is pursuing a religious mission and exercising its faith. Within that sphere, the Church cannot be required to tolerate a teacher who has transgressed its moral standards. Nor, having decided that Perich was no longer fit for the Church's ministry, can the Church be required to submit to Government review of its decision.

CONCLUSION

For *amici* and other churches and religious groups around the country, the right to control who teaches their faith, and who transmits it to the next generation, remains indispensible to the free exercise of religion. Especially when combined with the protections provided by the Assembly Clause, that right requires recognition of a robust ministerial exception—one sufficiently broad to encompass Petitioner's actions in this case.

The decision below should be reversed.

Respectfully submitted.

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APPENDIX

APPENDIX A:
LIST OF *AMICI CURIAE*

The *International Mission Board of the Southern Baptist Convention* (IMB) is an entity of the Southern Baptist Convention (SBC), the nation's largest Protestant denomination with more than 44,000 churches and 16.2 million members. To achieve its vision of seeing a multitude of every people, tribe, and tongue from around the world come to worship and exalt Jesus Christ as Lord and Savior, the IMB employs more than 5,000 Christian workers.

The *Ethics & Religious Liberty Commission of the Southern Baptist Convention* (ERLC) is the moral concerns and public policy entity of the SBC, the nation's largest Protestant denomination with more than 44,000 churches and 16.2 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. Religious freedom is an indispensible, bedrock value for SBC churches. To fulfill their God-ordained mission, SBC churches must be free to engage in activities that they discern God leads them to provide. In order to assure the missional integrity of these activities, they must be free to associate solely with those who share their beliefs and values across the entire spectrum of their religious mission.

The *Council of Hindu Temples of North America* is a voluntary association of Hindu Temples in North America. It is one of the largest Hindu umbrella bodies in North America, with a membership of over 100 Hindu Temples. The council advocates on behalf of Hindu Temples and Hindus in both the United States and Canada. The Council has an interest in

this case because it supports an interpretation of the ministerial exception that recognizes the religious nature of Hindu Temple workers such as priests, *swamis*, monks, *paricharakaras* (religious food preparers), *sthapatis* (religious architects), and *shilpis* (religious artisans). Although such roles may be unfamiliar to the secular court system, they have been recognized by Hindus as religious for millennia, and are integral to the religious life of Hindu Temples.

The *Mandaean Association of Massachusetts* (MAM) is an organization that seeks to preserve and maintain the Mandaean culture and traditions. The Mandaean religion is one of the oldest monotheistic faiths in the world. For the past 2000 years, Mandaeans have lived in Southwestern Iran and Southern Iraq, after originally emigrating there from Jerusalem. Today, they are the smallest and most vulnerable minority in Iraq. They number fewer than 60,000 people, scattered around the globe, threatened by total annihilation due to war and persecution. Mandaeans follow the teachings of Adam and their last teacher is John the Baptist. Adherents are expressly forbidden from carrying weapons, even for self-defense. Instead, the *Ginza Raba*—the chief Mandaean holy book— teaches to *oppose injustice bravely with words and knowledge, not iron*. Mandaeans therefore live their lives solely by peaceful means. In the past few years, few thousands of Mandaeans resettled in the United States of America, seeking the freedom of religion that this country cherishes and protects. MAM's work and commitment is to foster and protect the ancient true-Mandaean teachings. It joins this brief in support of protecting the autonomy of religious associations.

The *International Church of the Foursquare Gospel* is a Christian denomination that traces its founding to the inspired work of Aimee Semple McPherson beginning in Los Angeles in 1923. As a hierarchical church, the Foursquare Church has approximately 262,000 members and is organized into 14 districts across the United States. Its 1,865 U.S. churches are served by over 6,800 pastors called to ministry by the Foursquare Church. World-wide, the Foursquare Church has more than 64,000 churches and meeting places. According to the doctrine and practices of the Foursquare Church, the scope of the ministry of one who is called by God to that vocation extends to the "pulpit" of the class room. Foursquare has many licensed and ordained ministers serving it its colleges, secondary and primary schools, imparting the precepts of the faith along with other curriculum to their charges. Thus, the Foursquare Church has a core and vested interest in the question before the Court.

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 10-553

JUN 20 2011
OFFICE OF THE CLERK

In the Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH & SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* JEWISH EDUCATIONAL CENTER, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, AND THE NORTH AMERICAN DIVISION OF SEVENTH-DAY ADVENTISTS OFFICE OF EDUCATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The **Jewish Educational Center** ("JEC") is an education system in **Elizabeth, New Jersey, that provides an Orthodox Jewish education for students from pre-kindergarten through twelfth grade, including two high schools, the Rav Teitz Mesivta Academy and Bruriah High School. The Jewish Educational Center currently educates over 830 children from throughout the New York tri-state area and beyond. Among the alumni of the Jewish Educational Center are two U.S. Ambassadors and former Secretary of Homeland Security Michael Chertoff. The Jewish Educational Center has a two-fold mission: to prepare each child to be a moral, well-educated Orthodox Jew, strongly rooted in his or her faith and the land and people of Israel, and to provide a firm academic foundation that allows each student to excel in all of life's educational, professional, and civic challenges. The JEC seeks to provide a comprehensive foundation for the total development of the students, including their intellectual, emotional, social, physical, and religious needs. The Jewish Educational Center believes that an essential component of this mission is the positive interaction of home, family, and school. This positive interaction ensures that each student will become a responsible, productive, cultured, educated American citizen of the Jewish faith. The yeshiva guides each of its students to recognize the obligation to one's self,**

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[1] Pursuant to this Court's Rule 37, letters of consent from all parties for the filing of this brief have been submitted to the Clerk. *Amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

one's family, one's school, the larger Jewish community, and the world.

The Association of Christian Schools International ("ACSI") is a worldwide organization dedicated to delivering the Gospel of Jesus Christ through faith-based education in primary and secondary schools. ACSI serves over 5,900 member schools, in over 100 countries, with an enrollment of more than 1.4 million students. ACSI believes that "God's Word is the moral authority that informs all of our intellectual, spiritual, social and physical pursuits. Thus, true education of the person can only occur when all facets of learning are rooted in and viewed through the lens of God's Word." ACSI, therefore, aims to enable "Christian school students worldwide to acquire wisdom, knowledge, and a biblical worldview as evidenced by a lifestyle of character, leadership, service, stewardship, and worship." ACSI believes that every person with whom students come into contact, especially the front-line educators who spend the most time with students, serves as a living example of the Gospel of Jesus Christ.

The North American Division of Seventh-day Adventists Office of Education also recognizes that the faith-based education of youth is foundational to the beliefs and mission of the church. Since the 1860s, the Seventh-day Adventist Church has had an interest in "propagating education" that is established upon "the philosophy that students at all levels of schooling possess individuality and should be educated to use their God-given capacities to become individuals of principle, qualified for any position of life." Seventh-day Adventists also adhere to the philosophy that "education should be redemptive in nature, for the

purpose of restoring human beings to the image of God. ... Mental, physical, social, and spiritual health, intellectual growth, and service to humanity form a core of values that are essential aspects of the Adventist education philosophy." The Seventh-day Adventists' Education Department guides nearly 7,600 schools, over 80,000 teachers, and 1,545,000 students. The church critically relies on Seventh-day Adventist educational systems in fulfilling its core mission of "preaching, teaching and healing ministries."

The ministerial exception and the application of the ecclesiastical abstention doctrine to faith-based schools and their teachers are vitally important to *amici* as the JEC, the ACSI, and the North American Division of Seventh-day Adventists Office of Education rely upon teachers who have and demonstrate a religious worldview in order to impart such a faith-based worldview on to the students. For the JEC, the ACSI, and the North American Division of Seventh-day Adventists Office of Education, teachers are primarily devoted to inculcating and fostering true faith through teaching every subject from a religious worldview. A teacher in such a faith-based school is, above all things, a minister or rabbi first.

SUMMARY OF THE ARGUMENT

Faith-based schools are one of the primary means of perpetuating the faith and beliefs of a religious ministry. The persons at a faith-based school most responsible for instilling such faith and belief are the teachers. These teachers model lives of faith for their students, incorporate faith into every subject that they teach, and communicate the faith of their religious ministry to their students. One study of students in

Jewish day schools found that day school attendance is a significant factor in the religious and social development of Jewish students and a prominent factor even among students that already had a substantial Jewish background. Another study, of students in Seventh-day Adventist schools, found that maintaining a religious environment in schools was as important to the development of faith in the students as having a religious environment at home and attending church. No less than any other religious figure, then, a teacher in a faith-based school is a minister or rabbi, shaping and conveying the message of the religious ministry to the students. Religious schools must consider the same factors in hiring and firing their teachers that they make in hiring or firing a minister or rabbi who preaches in a church or synagogue. Both are fundamentally religious positions. The Free Exercise Clause, through the ministerial exception, protects from government interference decisions regarding whom to place in the spiritual functions of teaching, modeling, and perpetuating the faith and the manner in which those duties are divided and assigned.

Similarly, to avoid the courts' having to delve into theological matters and favor or disfavor one theological opinion over another, the ecclesiastical abstention doctrine has, for over one-hundred years, prohibited courts from considering matters of a ministry's governance, appointments, or internal affairs such as employment decisions. Courts are ill-equipped to engage in such religious parsing. The effect of a court's review of teacher employment decisions by faith-based educational institutions would be to choke off their voice for the particular religious faith and effectively determine for the faith-based organization who may or may not speak on its behalf.

ARGUMENT

I. ONLY THROUGH APPLYING A BROAD MINISTERIAL EXCEPTION CAN THE VITAL ROLE THAT TEACHERS IN FAITH-BASED SCHOOLS PLAY IN PERPETUATING THE RELIGIOUS ORGANIZATION'S EXISTENCE, PURPOSE, AND FAITH BE PROTECTED.

Aside from preaching from the pulpit, faith-based schools are the primary means of perpetuating the faith and beliefs of a religious ministry. This Court recognizes the "critical and unique role of the teacher in fulfilling the mission of a church-operated school." *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501 (1979). As the D.C. Circuit observed, "determination of whose voice speaks for the church is *per se* a religious matter." *Minker v. Balt. Annual Conference of the United Methodist Church*, 894 F.2d 1354, 1356 (D.C. Cir. 1990). Likewise, multiple circuit courts recognize:

> The relationship between an organized church and its ministers is its lifeblood. The Minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern.

McClure v. Salvation Army, 460 F.2d 553, 558-59 (5th Cir.) (1972); *see also Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1577 (1st Cir. 1989); *Minker v. Balt. Annual Conference of the United Methodist Church*, 699 F. Supp. 954, 955 (D. D.C. 1988); *cf. Dowd v. Soc'y of St. Columbans*, 861 F.2d 761, 764 (1st Cir. 1988) (per curiam) (involving priest's "membership rights" claim against missionary society); *Hutchison v. Thomas*, 789 F.2d 392, 396 (6th Cir. 1986); *Kaufmann*

v. Sheehan, 707 F.2d 355, 358-59 (8th Cir. 1983); *Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 493 (5th Cir. 1974).

Teachers are essential in diffusing a religious ministry's message, a primary function of faith-based schools, and one that is of vital interest and importance to the preservation and advancement of the beliefs of a religious body. *Rayburn v. Gen. Conference of Seventh-day Adventists*, 772 F.2d 1164, 1167–68 (4th Cir. 1985). In fact, the basis for the ministerial exception is founded upon the principle that "perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large." *Id.* at 1168. Teachers in faith-based schools serve each of these roles through teaching and modeling a lifestyle demonstrating a religious worldview as they perpetuate the faith and mission of their religious ministry.

Brandeis University's Maurice and Marilyn Cohen Center for Modern Jewish Studies and the Partnership for Excellence in Jewish Education, interested in learning how Jewish day schools support the educational and religious upbringing of their students, surveyed over 3,300 Jewish undergraduates. The results, published in a study entitled *The Impact of Day School: A Comparative Analysis of Jewish College Students*, show that attending a Jewish day school has a significant effect on the religious and social development of the students. The study found that

> [a]lthough many undergraduates remain untouched by Jewish life during their college years and may feel distant from their Jewish roots,

> the former day school attendees in the present study ... stand out from their public and private school peers in the importance that they attribute to being Jewish at this point in their lives. Perhaps just as noteworthy is that day schooling appears to significantly raise the salience of being Jewish for non-Orthodox students ....

Fern Chertok et al., *The Impact of Day School: A Comparative Analysis of Jewish College Students* 35 (ver. 1.2 2007). The effects of day school attendance were prominent even among those students who otherwise had strong Jewish backgrounds. As the study noted, "[t]he fact that day school attendance is such a strong predictor of Jewish campus involvement among the non-Orthodox is particularly impressive given the substantial Jewish backgrounds of the overall sample including those who never attended a day school." *Id.* at 37. The effects of day school attendance on ritual observance were also significant. "It is clear that former day school attendees raised in Orthodox homes have the most consistent pattern of attendance at religious services, but the impact of day schooling on ritual observance can also be seen among those raised in non-Orthodox homes and even among those who experienced less than six years of day school." *Id.* at 38.

Similarly interested in learning how much education in its faith-based schools promotes faith, the Seventh-day Adventists commissioned three studies of *every* primary- and secondary-school student in a Seventh-day Adventist school in the United States. These studies, called the Valuegenesis studies, incorporate two decades of research, which illuminate the role that Seventh-day Adventist schools have in

fostering spiritual faith. Ed Boyatt, "School Days, School Daze: Valuegenesis and Adventist Schools," in *Valuegenesis Ten Years Later* 309 (2004). When asked "How much has each of the following helped you develop your religious faith?" seventy-four percent (74%) of students responded that attending a Seventh-day Adventist school helped either "very much" (36%) or "somewhat" (38%). V. Bailey Gillespie and Michael J. Donahue, Ed Boyatt, and Barry Gane, *Valuegenesis Ten Years Later: A Study of Two Generations* 302 (2004). Significantly, fifty-three percent (53%) of students attributed positive development of their faith to their teacher's faith. *Id.* Seventy percent (70%) of students stated that weeks of prayer at school positively impacted their faith's development, and sixty-three percent (63%) of students recognized that Bible classes developed their faith. *Id.* Seventh-day Adventist schools that make quality teaching, Seventh-day Adventist values, and maintaining a Seventh-day Adventist climate core values were found to have a significant positive impact on the maturity of the students' faith, on intrinsic faith development, and on commitment to the church. The results indicate factors that "cannot be duplicated in the public environment." The study also found that sixty percent (60%) of students in Seventh-day Adventist schools feel that they can talk to their teachers about faith, while thirty percent (30%) of students stated that their teacher's faith was "very much" an influence in their religious life. Michael Donahue and V. Bailey Gillespie, *Valuegenesis2: North American Division of Seventh-day Adventists Valuegenesis Survey Frequencies: Grades 6 to 12 Grade Specific Frequencies* (2001). "Since many baptisms are directly related to schools, the role of teachers in commitment to Jesus cannot be overstressed." Gillespie et al., *Valuegenesis Ten Years*

Later 336. Finally, the research established that the integration of family, church, and religious school environments is vital for high faith maturity and denominational loyalty. *Id.* at 361. The studies found that without any of these supportive environments, only thirty-five percent (35%) reach a high faith maturity. *Id.* With a single religiously-supportive environment, fifty-five percent (55%) reach a high faith maturity. *Id.* With two of these environments, sixty-nine percent (69%) were found to develop a rich, growing faith life. *Id.* Finally, with the incorporation of all three environments—home, church, and school—that percentage "jumps to 75%" of students who develop a mature faith. *Id.* In studying those students who develop a "biased, self-serving" religious attitude, the incorporation of all three environments drops the percentage from 53% to only 3%. *Id.* In the end, the Seventh Day Adventists' comprehensive research demonstrates that their faith-based schools and the teachers in those schools do play a vital role in perpetuating the faith, mission and beliefs of the church.

The Free Exercise Clause protects from government interference decisions regarding whom to place in the spiritual functions of teaching, modeling, and perpetuating the faith and the manner in which those duties are divided and assigned. *Petruska v. Gannon Univ.*, 462 F.3d 294, 307 (3d Cir. 2006) ("any restriction on the church's right to choose who will carry its spiritual message necessarily infringes upon its free exercise right to profess its beliefs"). This is especially true in issues dealing with the terms of a religious leader's calling and employment decisions based "largely on religious criteria." *EEOC v. Southwestern Baptist*

Theological Seminary, 651 F.2d 277, 283 (5th Cir. 1981).

Faith-based schools utilize the school forum to teach religious beliefs and traditions and as an integral part of developing future generations' faith and knowledge. The JEC was established with a constitution that set forth the desire to introduce students to

> the vast treasure of wisdom and righteousness based on the Torah and Talmud; to perpetuate traditional Judaism, and to instill into the hearts of the American Jewish youth a love for Americanism and the principles of democracy; to encourage Jewish youth to participate in the affairs of the Synagogue ... and to provide a proper environment for Jewish youth, free of radical and destructive influences and based on morality, rectitude and sanctity ....

Rivkah Teitz Blau, *Learn Torah, Love Torah, Live Torah: Harav Mordechai Pinchas Teitz: The Quintessential Rabbi* 126–27 (2001). Another proponent of Jewish day schools, the AVI CHAI Foundation, "believes that Jewish day school programs should incorporate serious experiential education, since the religious goals of the schools are affective and practice-oriented as well as cognitive. Day schools therefore are encouraged to ... generate physical and spiritual environments that will inspire students to practice Judaism passionately." *Deepening Religious Purposefulness*, The AVI CHAI Foundation, http://avichai.org/projects-in-north-america/deepening-religious-purposefulness/ (last visited June 16, 2011).

Similarly, the ACSI believes that Christian schools are Biblically called to enable children to "mature to loving God with all their heart, mind, and soul (Matthew 22:37); growing in wisdom and stature (Luke 2:52); living in the world as salt and light (Matthew 5:13–14); and giving sacrificially of themselves and their resources reflecting the essence and love of the Christ who lives and dwells within them (Romans 12:1)." Ass'n of Christian Sch. Int'l, *ACSI Vision and Mission*, http://www.acsi.org/tabid/535/itemid/20/default.aspx (last updated Apr. 12, 2011). ACSI-affiliated schools consider religious education to be critical in academic and spiritual development in the formation of a life dedicated to the service of God and society. Ass'n of Christian Sch. Int'l, *ACSI Core Beliefs*, http://www.acsi.org/tabid/535/itemid/3113/default.aspx (last updated Jan. 5, 2009). Furthermore, ACSI-affiliated schools focus on challenging both students and educators to be involved in the Great Commission through evangelizing and discipling, thereby perpetuating the church's very existence. *Id.*

In addition to utilizing faith-based schools to teach youth and spread the message of the faith, many Christian educators believe that Christian education and training for the young is a call of the Christian faith. The Bible provides explicit instruction regarding education of children in Christian principles and faith. Deuteronomy 6:6–7 (KJV) charges parents: "And these words, which I command thee this day, shall be in thine heart: and thou shalt teach them diligently unto thy children..." Again, in Ephesians 6:4 (KJV) the Bible commands, "And ye fathers, provoke not your children to wrath: but bring them up in the nurture and admonition of the Lord." Charles Spurgeon explained the vast religious significance of Christian

training for the young, stating that "parents sin when they omit religion from the education of their children ... let us never be guilty, as parents, of forgetting the religious training of our children; for if we do we may be guilty of the blood of their souls." Charles H. Spurgeon, *Come, Ye Children: A Book for Parents and Teachers on the Christian Training of Children* (1897).

Though parents maintain the ultimate responsibility for the education of their children, "the school serves the Christian home." Ass'n of Christian Sch. Int'l, *The Biblical Mandate for Christian Schooling*, http://www.acsi.org/Resources/Publications Newsletters/ChristianSchoolEducation/tabid/681/itemId/2413/Default.aspx (last updated Mar. 26, 2009). Dr. Roy W. Lowrie Jr., a founder of ACSI, referred to the value and significance of school educators as "the gold in the bank" of the faith-based school, stating that they "cast a long shadow" upon the lives of the children they teach. Ass'n of Christian Sch. Int'l., *Authentic Christian Education*, http://www.acsi.org/Resources/ReferenceLibrary/tabid/568/itemId/12/Default.aspx (last updated Sept. 2, 2010). ACSI emphasizes that being a teacher in a Christian school is a deep and a "serious calling," because "their Christian character and Christian worldview permeate their teaching. They are more than just teachers who happen to be Christians." *Id.* A teacher's responsibility in a Christian school goes to the very cornerstone of Biblical instruction. *Id.* Teachers in faith-based schools are a vital link in the chain between the message and mission of religious institutions and the future generations who will carry on that mission.

The Seventh-day Adventist Church also fundamentally relies on religious education as the Seventh-day

Adventist Church adheres to the philosophy that "education should be redemptive in nature, for the purpose of restoring human beings to the image of God ... Mental, physical, social, and spiritual health, intellectual growth, and service to humanity form a core of values that are essential aspects of the Adventist education philosophy." Seventh-day Adventist Church, *Education,* http://www.adventist.org/mission-and-service /education.html (last visited Jun. 9, 2011). The Adventists depend heavily upon their schools for the sanctification and salvation of their youth. Dep't of Educ. Seventh-day Adventist Church, *Departmental History,* http://education.gc.adventist.org/history.html (last visited Jun 13, 2011). Through their education systems their children are taught the values and lifestyles necessary to receive salvation. *Id.* This educational focus of their belief system dates back to the 1860s. *Id.* Since that time, the Adventists established an Education Department to direct nearly 7,600 schools, over 80,000 teachers, and 1,545,000 students. Dep't of Educ. Seventh-day Adventist Church, *Mission and Scope,* http://education.gc. adventist.org (last visited Jun 9, 2011). The very "heart of the church's mission" is brought about through "preaching, teaching and healing ministries." Seventh-day Adventist Church, *Mission and Service,* http://www.adventist.org/mission-and-service/index.html (last visited Jun. 9, 2011).

While it is clear that faith-based schools are dedicated to religious education, academic excellence remains an important part of their educational programs. Holistic incorporation of secular academic subjects in faith-based schools in no way diminishes the significance and necessity of faith-based school environments in furthering religion and developing

faith. Specifically, ACSI promotes the incorporation of religious instruction into each area of study "[t]hat in all things [God] might have the preeminence." Ass'n of Christian Sch. Int'l, *ACSI Core Beliefs*, http://www.acsi.org/tabid/535/itemid/3113/default.aspx (last updated Jan. 5, 2009) (citing Colossians 1:18). Thus, ACSI believes that the true mission and Biblical calling of Christian schools is evident even in traditionally secular academic subjects. Teachers in ACSI-affiliated faith-based schools are expected to provide knowledge and wisdom, as well as a religious worldview throughout the environment of their classroom and school day. Ass'n of Christian Sch. Int'l., *Authentic Christian Education*, http://www.acsi.org/Resources/ReferenceLibrary/tabid/568/itemId/12/Default.aspx (last updated Sept. 2, 2010). Biblical philosophy of education is integrated throughout all cultural contexts in the schools, which is "crucial to effective Christian schooling." Ass'n of Christian Sch. Int'l., *ACSI Core Beliefs*, http://www.acsi.org/tabid/535/itemid/3113/default.aspx (last updated Jan. 5, 2009). Thus, teachers in ACSI-affiliated faith-based schools are utilized to permeate faith throughout the environment of every class or subject, leading students by example to both process information and think critically with a particular religious worldview. *Id.* The manner, timeframe, and method in which they choose to do so remains entirely within the discretion of the faith-based institution.

The Seventh-day Adventist Church maintains the philosophy that "students at all levels of schooling possess individuality and should be educated to use their God-given capacities to become individuals of principle, qualified for *any* position of life." Seventh-day Adventist Church, *Education*, http://www.

adventist.org/mission-and-service/ education.html (last visited Jun. 9, 2011) (emphasis added). Their central beliefs mandate that "principles of faith and learning are integrated into the life of each of its students and schools." Dep't of Educ. Seventh-day Adventist Church, *Mission and Scope,* http://education.gc.adventist.org (last visited Jun. 9, 2011). This type of balanced teaching environment is essential in enabling students to practically incorporate faith into diverse areas of their lives, a goal that must be preserved.

Due to the impossibility of "separating the message from the messenger, a religious organization's fate is inextricably linked with those whom it entrusts with the responsibilities of preaching its word and ministering to its adherents." *Natal*, 878 F.2d at 1578. Teachers in faith-based school forums serve to "shape and convey the message of the church" to children and parents alike. *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 308–09 (4th Cir. 2004). Such communications embody the essence of a minister or rabbi, operating a vital role to the church in furthering a religious message to future generations. *Id.* The religious environment, character, leadership, and worldview that teachers of faith-based schools simultaneously, teach, foster, and exhibit throughout the classroom is immeasurable by judicial standards. It is for such reasons that careful selection of educators in faith-based schools to assist parents in religious training and the inculcating of religious environments for their children is vital in perpetuating the faith. As teachers in faith-based schools are "integral" and "important to the spiritual and pastoral mission of the church," government authorities are prohibited from interfering in the faith-based school's organization and administration over them. *Rayburn*,

772 F.2d at 1168–69; *See also Southwestern Baptist*, 651 F.2d at 277; *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1396–97 (4th Cir. 1990); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362–63 (8th Cir. 1991); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996); *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 797 (4th Cir. 2000).

For these reasons, teachers in faith-based schools must be considered ministers or rabbis, and civil courts are an inappropriate forum in which to evaluate their central role. It is both impractical and counter-productive for a court to attempt to measure the "primary duties" with a measuring stick or by the mere calculation of "religious" minutes in a classroom. For courts to do so is an exceedingly limiting approach, which discounts the holistic religious environment that faith-based schools strive to provide. Rather, courts must give wide deference to the religious organization's discretion, abstaining from delving into ministry policy and internal governance, in order to effectively protect religious autonomy in faith-based schools.

II. THE FIRST AMENDMENT'S ECCLESIASTICAL ABSTENTION DOCTRINE MANDATES A BROAD MINISTERIAL EXCEPTION, WHICH PROHIBITS COURTS FROM DELVING INTO MATTERS OF A RELIGIOUS MINISTRY'S GOVERNANCE, APPOINTMENTS, AND INTERNAL AFFAIRS SUCH AS TEACHER-EMPLOYMENT DECISIONS.

For over one hundred years, civil courts have been forbidden to decide "a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the

church to the standards of morals required of them." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, at 733 (1871). The United States Supreme Court defined the core of this First Amendment restraint on civil authority in *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952), determining that the First Amendment's restraint on civil authority acknowledges a "spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 116.

The foundational principle of the ecclesiastical abstention doctrine is that courts cannot decide cases that arise as a result of internal affairs of a religious organization such as governance and internal discipline. *See Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708–09 (1976) (holding that "religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them"); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440, 445–47 (1969); *Kedroff*, 344 U.S. at 114–16; *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16-17 (1929).

> The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who

> unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

Watson, 80 U.S. at 726–32; *see also NLRB*, 440 U.S. 490; *New York v. Cathedral Acad.*, 434 U.S. 125 (1977). Any lesser standard, the Court determined, "would deprive [religious] bodies of the right of construing their own church laws, [and] would open the way to all the evils which we have depicted as attendant upon" a civil court's intrusion on religious matters. *Watson*, 80 U.S. at 677-34 (mem.). As Justice Brennan asserted, ministries must be free to "select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected." *Corp. of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 341 (1987); *see also Milivojevich*, 426 U.S. at 696 (church has interest in effecting binding resolution of internal governance disputes).

Faith-based schools and ministries are included in this category of vital religious organizations. *NLRB*,

440 U.S. at 501. Thus, teacher employment issues at faith-based schools warrant the application of the ecclesiastical abstention doctrine. Adjudication of any claims against religious bodies, including faith-based schools, arising from their religious procedure thus asks civil courts to punish a religious body for following their religious disciplinary process. Such interference and obstruction of religious freedom is not only prohibited by the religion clauses of the First Amendment, it is protected as "a matter which concerns theological controversy, church discipline, and ecclesiastical government." *Watson,* 80 U.S. at 733.

The effect of a court's review of teacher employment decisions by faith-based educational institutions would be to choke off their voice for the particular religious faith and effectively determine for the faith-based organization who may or may not speak on its behalf. This is impermissible. The "determination of whose voice speaks for the church is a per se religious matter." *Alicea-Hernandez v. Catholic Bishop,* 320 F.3d 698, 604 (7th Cir. 2003) (quoting *Minker*, 894 F.2d at 1356). In this case and in thousands of faith-based schools throughout the country, the teacher speaks for the religious organization at all times through his or her teaching and actions. Once a court realizes that religious conduct is involved, the inquiry ends.

CONCLUSION

For the foregoing reasons, the Sixth Circuit's ruling in this case undermines First Amendment protection of faith-based schools in the United States. This Court should reverse the judgment of the Sixth Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORDS AND BRIEFS

No. 10-553

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In the Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* SUPPORTING PETITIONER

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I

INTEREST OF AMICUS[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the decision of the Sixth Circuit Court of Appeals should be reversed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School (15 years) and Biola University (7 years) in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010) and holds degrees in theology (M.A.R., Westminster Seminary, Escondido, CA) and taxation (M.S., Taxation, California State University, Fullerton).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Petitioner Perich is a duly commissioned minister who applied for and received a tax-exempt minister's parsonage allowance (26 U.S.C. § 107) as part of her compensation package. Based on her employer's undisputed status as a church, and her routine

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

religious duties, she meets the stringent requirements for this benefit. Her acceptance of the monetary benefits of the allowance, and her agreement to resolve disputes in accordance with internal church policy, imply that she has conceded her ministerial status—contrary to her assertions in this litigation.

Amicus curiae concurs with Petitioner's careful analysis of the ministerial exception, which guards the First Amendment freedom of religious employers to select representatives who are essential to its spiritual mission. The exception is far broader than the narrow class of employees who qualify as ministers for tax purposes. But it should never exclude those employees a church or other religious organization has chosen to ordain, license, or commission to carry out its mission. Tax-purpose ministers should be a subset of those who fall within the broader ministerial exception. Otherwise, if even this narrowly defined group is in danger of government reclassification, the ministerial exception is essentially a dead letter and religious employers must operate under a cloud of uncertainty.

The ministerial exception was crafted in order to *expand* the flexibility of religious organizations to make critical personnel decisions. Courts examine an employee's duties in order to stretch the religious employer's freedom beyond the boundaries of its formally ordained leadership—not to interfere with the ability to make decisions about an employee's fitness for ministry. The ministerial exception is subject to judicial restraint concerning internal church affairs and relationships more generally. Just as courts refuse to step into the relationship between a church and its religious employees, they typically abstain from

becoming entangled in church discipline or doctrine, and they routinely reject "clergy malpractice" claims.

ARGUMENT

I. THE MINISTERIAL EXCEPTION SHOULD NEVER EXCLUDE A CHURCH EMPLOYEE WHO HAS BEEN ORDAINED, LICENSED, OR COMMISSIONED AND THUS QUALIFIED TO RECEIVE A TAX-EXEMPT MINISTERIAL HOUSING ALLOWANCE.

"[T]he fact that Perich was a 'commissioned minister'...*in and of itself* should have been sufficient to satisfy the...ministerial exception." Reply Pet. 11, citing Pet. Ct. App. Br. 23 (emphasis added).

When Hosanna Tabor-Lutheran commissioned Perich and hired her as a "called" teacher, she was authorized to receive a minister's parsonage allowance as part of her compensation. Cert Pet. 3. "Called" teachers are hired by the church congregation, given the title "commissioned minister," and eligible to receive the minister's housing allowance as part of their compensation. *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*, 597 F.3d 769, 772 (6th Cir. 2010). That allowance provides a substantial tax benefit to ministers: exemption from income tax to the extent it is used for housing costs and does not exceed the fair rental value of the minister's home. 26 U.S.C. § 107. Perich claimed this benefit on her income tax return during her employment with the school. *EEOC v. Hosanna-Tabor Evangelical Lutheran*, 597 F.3d at 772.

The definition of "minister" for tax purposes is more restrictive than the ministerial exception. Certainly the latter should never *exclude* those employees a church or other religious organization has chosen to ordain, license, or commission to carry out its religious mission. If even this narrow category is at risk of government reclassification, the "ministerial exception" is effectively stripped of its meaning and usefulness. Petitioner admits the exception extends beyond ordained ministers. Opp. Pet. 19. But her proposed application of it would eliminate some of those who meet the narrow Sect. 107 criteria, creating great uncertainty and damaging the ability of even churches—let alone other religious entities—to select the persons whose positions are "important to the spiritual and pastoral mission of the church." *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 801 (4th Cir. 2000). No employee is more important to the religious mission of a church school than the teachers who train its students. "The relationship between an organized [church school] and its [teachers] is its lifeblood. The [teacher] is the chief instrument by which the [church school] seeks to fulfill its purpose." *McClure v. Salvation Army*, 460 F.2d 553, 558-559 (5th Cir. 1972). The question of "who will teach" in a church-operated school is just as fundamental as "who will preach" from the church pulpit—and should not be "corrode[d] with an overlay of civil rights legislation and other parts of the Constitution." *Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 492 (5th Cir. 1974).

A. Courts Examine Employee Duties To *Expand*—Not *Restrict*—The Freedom Of Religious Organizations To Handle Internal Personnel Decisions Free Of Government Interference.

The "paradigmatic application" of the ministerial exception is to ordained ministers, but it "encompasses more than a church's ordained ministers." *Alcazar v. Corporation of Catholic Archbishop*, 627 F.3d 1288, 1291 (9th Cir. 2010) (seminary student hired to perform maintenance duties); *see also Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1358 (D.C. Cir. 1990) (United Methodist minister).

> The ministerial exception encompasses all employees of a religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral mission.

Starkman v. Evans, 198 F.3d 173, 176 (5th Cir. 1999), quoting *EEOC v. Catholic Univ. of Am.*, 83 F. 3d 455, 463 (D.C. Cir. 1996); *see also EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d at 801. The exception embraced the choir director in *Starkman* (barring her disability claim), the non-ordained nun in *Catholic Univ. of Am.* who taught canon law, the elementary school music teacher in *Roman Catholic Diocese of Raleigh*, and many others: *Tomic v. Catholic Diocese*, 442 F.3d 1036, 1040-41 (7th Cir. 2006) (organist/music director); *Alicea-Hernandez v. Catholic Bishop*, 320 F.3d 698, 704 (7th Cir. 2003) (press secretary); *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 309-11 (4th Cir. 2004) (Jewish nursing home staff). These cases stand in stark contrast to

those where employees have unmistakably secular duties and would not qualify as ministers for any legal purpose. *See, e.g., Weissman v. Congregation Shaare Emeth*, 38 F.3d 1038, 1040 (8th Cir. 1995) (supervisor of administrative, clerical, building maintenance, and custodial personnel); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981) (administrative and support staff); *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272 (9th Cir. 1982) (editorial secretary); *Whitney v. Greater New York Corporation of Seventh-day Adventists*, 401 F. Supp. 1363 (S.D.N.Y. 1975) (typist-receptionist).

As these cases illustrate, the ministerial exception was never intended to *exclude* "ordained, licensed, or commissioned" ministers who qualify for the parsonage allowance. Courts examine duties in order to *expand* the reach of the exception to cover other employees whose functions are essential to an organization's religious mission. It is an "extension of the rule beyond its application to ordained ministers." *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007) (hospital chaplain). Just as "religious music plays a highly important role in the spiritual mission of the church" (*Starkman v. Evans*, 198 F.3d at 176), teachers play an essential role in the spiritual mission of a church-operated school.

The "primary duties" test appears to lift language from a law review article with little thought as to how it might mesh with other ministerial employment tests such as the parsonage allowance:

> "As a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious

> order, or supervision or participation in religious ritual and worship, he or she should be considered 'clergy.'" Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 Columbia L. Rev. 1514, 1545 (1979).

Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) ("*Rayburn*"); *see also Hollins v. Methodist Healthcare, Inc.*, 474 F.3d at 226, *EEOC v. Hosanna-Tabor Evangelical Lutheran*, 597 F.3d at 778. Even so, "[t]his approach necessarily requires a court to determine whether a position is important to the spiritual and pastoral mission of the church." *Rayburn*, 772 F.2d at 1169. And no position is more important to the "spiritual and pastoral mission" of a church *school* than its teachers.

B. Perich's Position And Duties Are Consistent With Her Eligibility To Receive The Minister's Parsonage Allowance.

As a commissioned minister employed by a church to perform religious duties, Perich qualifies for the tax benefits of the minister's parsonage allowance—and there is no indication that she disputes her eligibility.

1. Perich Was Commissioned By The Church Congregation.

Perich argues that she was "not an ordained minister." Opp. Pet. 20. But to qualify for the parsonage allowance, a minister need only be ordained *or* licensed *or commissioned*, allowing for differences in terminology and varying levels of ministerial service. The test is disjunctive—any one of the three categories

is sufficient. *Knight v. Commissioner*, 92 T.C. 199, 203 (1989); *Wingo v. Commissioner*, 89 T.C. 922, 933, 937 (1987); *Ballinger v. Commissioner*, 728 F.2d 1287 (10th Cir. 1984); *Silverman v. Commissioner*, 57 T.C. 727 (1972), aff'd (8th Cir. 1973) (Jewish cantor qualified even though the Jewish faith only ordains rabbis); *Salkov v. Commissioner*, 46 T.C. 190, 197 (1966) (same); Rev. Rul. 78-301, 1978-2 C.B. 103 (same). The Lutheran Missouri Synod recognizes both ordained and commissioned ministers. Cert. Pet. 3. It is not necessary that the minister attain the highest level of service or be able to perform all the ministerial functions of the particular faith. *Knight v. Commissioner*, 92 T.C. at 202-203 (licensed pastor could not perform all the duties of formally ordained minister); *Wingo v. Commissioner*, 89 T.C. at 933, 923, 934-935 (probationary member of United Methodist Church was ordained as a deacon and licensed as a local pastor but not qualified for ordination as an elder). The ministers in *Wingo* and *Knight* argued unsuccessfully against their own ministerial status so that their late-filed self-employment tax exemptions might be timely. The Tax Court found both of them to be "ministers" for tax purposes.

The overlapping disjunctive terminology (ordained, licensed, *or* commissioned) applies to the ministerial exception as well. The exception was crafted in the context of a *commissioned* minister working for the Salvation Army. *McClure v. Salvation Army*, 460 F.2d at 555. In a later example, the ministerial exception barred the discrimination claims of a female denied employment as an associate pastor. The position was open to an ordained minister (male), a ministerial intern (male), or a female associate such as Rayburn—eligible for a "commissioned minister

credential" or "commissioned minister license" but not ordination. *Rayburn*, 772 F.2d at 1165.

Perich's lack of ordination is not a bar to her eligibility for the parsonage allowance or her status as a ministerial employee. Both apply to commissioned ministers.

2. Perich Was Employed By A Church.

Ministers may qualify for the parsonage allowance while employed by either a church or other organization—but church employers, like Hosanna-Tabor Lutheran, have far greater flexibility in assigning duties without jeopardizing the allowance.

The Internal Revenue Code and related regulations specify the types of duties a minister must be performing in order to qualify for the parsonage allowance. Treas. Regs. §§ 1.107-1(a), 1.1402(c)-5. The employer may be a church, an integrated auxiliary of a church, or some other organization. If the employer is a church or other religious organization, the minister can be performing any or all of the following three types of duties:

- Ministration of sacraments ("sacerdotal functions")
- Conduct of religious worship
- Control, conduct, and maintenance of a religious organization (including the boards, societies, and other integral agencies of such organization), under the authority of a religious body constituting a church or church denomination.

Treas. Reg. § 1.402(c)-5(b)(2)(iv). Ministers who work for non-church organizations must be performing sacerdotal functions or conducting religious worship. Some have failed this stricter test, e.g., *Tanenbaum v. Commissioner,* 58 T.C. 1 (1972) (minister performing public relations duties for the American Jewish Committee); *Toavs v. Commissioner,* 67 T.C. 897, 901, 905 (1977) (minister serving in administrative position for nursing home affiliated "in spirit and charity" with the Assemblies of God but lacking any legal relationship with the church); *Colbert v. Commissioner*, 61 T.C. 449, 452 (1974) (minister employed as director of missions for Christian Anti-Communism Crusade). Ministers may also perform services under a valid assignment by a church, but "the minister must have been assigned by the church for reasons directly related to the accomplishment of purposes of the church"—"perfunctory ratification" is insufficient. *Boyer v. Commissioner*, 69 T.C. 521, 532 (1977) (minister who taught business data processing at a state college did not qualify).

"Petitioner Hosanna-Tabor Evangelical Lutheran Church and School (the Church) is an ecclesiastical corporation and member congregation of The Lutheran Church—Missouri Synod." Cert. Pet. 2. It is a *church*. It was the voting members of the *church* congregation who commissioned Perich and later rescinded her call. Cert. Pet. 3, 5. As a church, Hosanna-Tabor has greater latitude in assigning duties to the ministers it designates to fulfill its spiritual mission. This tax-related rule should be no less true when considering the ministerial exception.

3. Perich's Routine Duties Are Quintessentially Religious In Nature.

Perich's duties—involving devotional exercises, prayer, and chapel—fit squarely within Sect. 107 as leading the religious worship of the school's students:

- Teaching religion classes four days a week
- Leading students in daily morning devotional exercises
- Leading students in prayer three times a day
- Attending chapel with her students each week and leading the service in rotation with other teachers

EEOC v. Hosanna-Tabor Evangelical Lutheran, 597 F.3d at 772.

Perich argues that she did not "serv[e] in a pastoral role to the congregation" (Opp. Pet. 3), "act as an intermediary between the church and its congregation, lead or play a role in the church's spiritual rituals, participate in church governance, or provide pastoral services to congregation members" (Opp. Pet. 20), or "indoctrinate its faithful into its theology" (Opp. Pet. 28). Neither Sect. 107 nor the broader ministerial exception adopts such a truncated view of a minister's duties. Ministers do all of these things when serving a church congregation directly, but they perform many other functions that are no less important to the church's mission, including teaching children, community outreach, and evangelism.

> [P]erpetuation of a church's existence may depend upon those whom it selects to preach its values, *teach* its message, and interpret its

> doctrines both to its own membership *and to the world at large*.

Rayburn, 772 F.2d at 1168 (emphasis added). Churches often serve their local communities through day care services and undergraduate schools. These facilities have an essential religious component and purpose even if teachers are not required to belong to a particular congregation, and even though substantial time is devoted to teaching "secular" subjects. Hosanna-Tabor may not require every teacher to be Lutheran or to maintain membership in a particular congregation, but it does require them to belong to the *Christian* faith, and those it commissions as "called" teachers must undergo training in Lutheran theology.

In the educational context, there is specific legal authority concerning the eligibility of religious teachers to receive the minister's parsonage allowance:

- Rev. Rul. 57-107, 1957-1 C.B. 277 (non-ordained teachers in parochial schools of a church denomination, who are inducted into the teaching ministry according to the rites of the particular church)
- Rev. Rul. 62-171, 1962-2 C.B. 39 (ministers who have teaching or administrative positions at a parochial school or college that is an "integral agency" of a religious organization, under the authority of a church or church denomination)
- Rev. Rul. 55-243, 1955-1 C.B. 490 (heads of religious departments, teachers, and administrators on the faculty of a college that is an "integral agency" of a church) (*see also* Rev. Rul. 70-549, 1970-2 C.B. 16)

- Treas. Reg. § 1.107-1(a)(2) (professors at a theological seminary)

Perich fits squarely within this framework, having been trained, commissioned, and called within the established practices of the Lutheran Church—Missouri Synod. If she qualifies for the strictly scrutinized parsonage allowance, she is per se a ministerial employee. It is a patent violation of the First Amendment to require a church-owned school to retain a commissioned teacher-minister after the congregation has determined she is no longer fit for ministry.

4. There Are No Facts To Indicate That Perich's Commissioning Was A Sham Or Subterfuge To Evade A Legal Obligation Or Secure A Legal Benefit.

A few cases have ruled that a ministerial designation was a sham or subterfuge designed solely to secure tax benefits. *Lawrence v. Commissioner*, 50 T.C. 494, 498 (1968) (church minutes stated that minister of education was commissioned so that he could receive certain tax benefits—but his duties remained the same); *Johnston v. Commissioner*, 56 T.C.M. (CCH) 520 (1988) (individual who obtained charter from Universal Life Church to form congregation of which she was pastor and only donor was not entitled to housing allowance exclusion).

Similarly, "if a church labels a person a religious official as a mere subterfuge to avoid statutory obligations, the ministerial exception does not apply." *Alcazar v. Corporation of Catholic Archbishop*, 627 F.3d at 1292; *Tomic v. Catholic Diocese*, 442 F.3d at

1039. In order to avoid encroaching on the sanctity of religious territory in personnel matters, courts would be wise to adopt a presumption that could be rebutted by proof that either the church is a fake or the title "minister" is a sham bestowed solely to evade legal obligations. *Schleicher v. Salvation Army*, 518 F.3d 472, 478 (7th Cir. 2008) ("internal affairs" doctrine barred claims of ordained ministers working for thrift shop operated by the Salvation Army).

The 2.4 million member Lutheran Church-Missouri Synod is the eighth largest Protestant denomination and was founded in the nineteenth century. Perich was commissioned according to established church procedures, including a requirement for theological training. No one has attacked either the church's status or its commissioning process as a sham.

II. PETITIONER SHOULD BE ESTOPPED FROM DENYING HER MINISTERIAL STATUS.

Perich and the school have agreed that she is a ministerial employee. She completed the required theological training, accepted the substantial tax benefits associated with the minister's housing allowance, accepted her commission, and agreed to abide by the internal dispute resolution policy for ministers. Her denial of her ministerial status is *inconsistent with the benefits she accepted and policies she agreed to*. She should be estopped from making that argument now—after accepting benefits available only to qualified ministers and claiming them on her tax returns. It would wreak havoc inside religious institutions if its good faith classifications were subject to judicial review even for ministers it identifies as eligible for the parsonage allowance under tax

regulations far more restrictive than the ministerial exception required by the First Amendment.

> Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. *Davis v. Wakelee*, 156 U.S. 680, 689 (1895).

New Hampshire v. Maine, 532 U.S. 742, 749 (2001).

A. Perich's Inconsistencies Fall Within The Rubric Of Judicial Estoppel And Its Rationale.

Judicial estoppel "prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Id.* at 749, quoting *Pegram v. Herdrick*, 530 U.S. 211, 227 n. 8 (2000). Although filing an income tax return is not a legal proceeding (the normal context for judicial estoppel), Perich claimed substantial tax benefits and had to sign her return under penalty of perjury—identifying herself as a minister. Her inconsistencies warrant the application of standard judicial estoppel principles:

- Her position on her tax return (ministerial status) is "clearly inconsistent" with her position in this litigation. *New Hampshire v. Maine*, 532 U.S. at 750. Perich claimed substantial tax benefits available only to an ordained, licensed, or commissioned minster.

She now denies her status as a "ministerial employee" because that would preclude her claims against the school under the ADA.

- Perich successfully asserted her ministerial status on her tax return. *Id.* at 750. She claimed the housing allowance on at least one year's tax return while employed by the Church. *EEOC v. Hosanna-Tabor Evangelical Lutheran*, 597 F.3d at 772.

- Through her assertion of inconsistent positions. Perich "derive[s] an unfair advantage" and "impose[s] an unfair detriment" on the Church if she is not estopped. *New Hampshire v. Maine*, 532 U.S. at 751. She secures the tax benefits of the minister's parsonage allowance *and* holds her church employer liable using federal statutes that cannot constitutionally be applied to a ministerial employment relationship.

Judicial estoppel was created to uphold "the proper reverence for the sanctity of [the] oath." *Hamilton v. Zimmerman*, 37 Tenn. (5 Sneed) 39, 48 (1857). It was designed "to protect the integrity of the judicial process," *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982), by "prohibiting parties from deliberately changing positions according to the exigencies of the moment," *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993). Perich has met the "exigenc[y] of the moment" by denying the ministerial status she asserted on her income tax returns.

B. Perich Consented To The Internal Dispute Resolution Policies Applicable To Pastoral Staff.

Perich acknowledged her ministerial status when she accepted her call from the congregation and agreed to be subject to the same dispute resolution procedures as the church's pastor. Cert. Pet. 3. The bylaws of the Lutheran Church-Missouri Synod (LCMS) require that disputes over fitness for ministry be resolved exclusively through a binding dispute resolution procedure. The Preamble to those bylaws provides that:

> The Synod in the spirit of 1 Corinthians 6 calls upon all parties to a disagreement, accusation, controversy, or disciplinary action to rely exclusively and fully on the Synod's system of reconciliation and conflict resolution. The use of the Synod's conflict resolution procedures shall be the exclusive and final remedy for those who are in dispute. *Fitness for ministry and other theological matters must be determined within the church.*

Jenkins v. Trinity Lutheran Church, 825 N.E.2d 1206, 1209 (Ill. Ct. App. 2005), quoting the Preamble (emphasis added) (dismissing claims of associate pastor other than contract claims the bylaws expressly excluded from binding arbitration). *See also Simpson v. Wells Lamont Corp.*, 494 F.2d at 494 (after pastor was dismissed according to procedures in the Church's *Book of Discipline*, his sole remedy was the appellate process within the church hierarchy). The congregation rescinded Perich's call according to procedures she agreed to abide by when she was hired.

She cannot now complain that those procedures do not apply to her.

III. THE MINISTERIAL EXCEPTION IS PART OF A BROADER PATTERN OF JUDICIAL RESTRAINT WHEREIN COURTS DO NOT INTERFERE IN THE INTERNAL RELATIONSHIPS OF A RELIGIOUS ORGANIZATION.

Long before *Lemon* introduced entanglement concerns into First Amendment jurisprudence, this Court declined to become embroiled in ecclesiastical matters. Perich misses the point when she complains that the church is seeking "total immunity from employment discrimination claims"--and alleges that all sorts of other corporations would also prefer such immunity. Opp. Pet. 32. But the Religion Clauses guarantee leeway to religious organizations to define the contours of its internal relationships "independen[t] from state control or manipulation." *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 116 (1952). The Church seeks only the deference this Court has routinely granted in past decades. Reply Pet. 3. Protected relationships include clergy-congregant, church-member, and employer-ministerial employee.

The ministerial exception is a logical consequence of the conclusions that (1) "the imposition of secular standards on a church's employment of its ministers will burden the free exercise of religion" and (2) "the state's interest in eliminating employment discrimination is outweighed by a church's constitutional right of autonomy in its own domain." *EEOC v. Catholic Univ. of Am.*, 83 F.3d at 467. Even

if a church has failed to follow its own procedures or its removal of a ministerial employee appears arbitrary to those outside the church, no court may "impermissibly substitute its own inquiry into church polity and resolutions based thereon of those disputes." *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708 (1976). Nor may the court demand "a minimum basis in doctrinal reasoning." *Rayburn*, 772 F.2d at 1169. The ministerial exception protects the "action taken," not merely the "possible motives." *EEOC v. Catholic Univ. of Am.*, 83 F.3d at 465.

This Court understands that "[t]he church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school." *Nat'l Labor Relations Bd. v. Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979). Allowing the National Labor Relations Board to interfere in this relationship was ruled unconstitutional under both Religion Clauses because it "would impinge upon the freedom of church authorities to shape and direct teaching in accord with the requirements of their religion." *Id.* at 496.

Churches are not above the civil law in every respect. The nature of the claim shapes the legal analysis. There is a huge difference between telling a church who it must hire or retain to carry out its mission, and requiring it to follow laws about minimum wage or equal pay after it has selected a religiously qualified employee. *Dole v. Shenandoah Baptist Church,* 899 F.2d 1389, 1392, 1397 (4th Cir. 1990) (equal pay for male and female employees at a religious school); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1370 (9th Cir. 1986) (equal health insurance benefits for male and female church school

employees); *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303-305 (1985) (religious organization required to comply with minimum wage, overtime, and recordkeeping laws). Courts sometimes take a "hands off" approach to even this limited level of regulation. *Schleicher v. Salvation Army*, 518 F.3d at 474 (ordained ministers were outside the ambit of the Fair Labor Standards Act). Regulating particular aspects of a mutually satisfactory employment relationship is not comparable to requiring a church to maintain that relationship when the employee ceases to meet the religious requirements for the position. Courts may also examine the duties of a duly "ordained, licensed, or commissioned" minister to determine whether that employee qualifies for the tax-exempt parsonage allowance. Such scrutiny does not encroach on a church's decision about who it will hire or retain.

As Perich admits, federal law allows churches to consider religion in its initial hiring decisions. Opp. Pet. 32. In additional to hiring decisions, churches need flexibility to make decisions about retention—to respond to changes in an employee's religious beliefs or conduct that would imperil that person's ability to carry out the organization's mission. That is the essence of this case—requiring a *church* school to reinstate a commissioned minister originally hired to teach *religion* to its students and lead them in *worship*. This Court cannot substitute its view of Perich's current qualifications "without entangling the government in questions of religious doctrine, polity, and practice." *Gellington v. Christian Methodist Episcopal Church, Inc.* 203 F.3d 1299, 1304 (11th Cir. 2000), quoting *Jones v. Wolf*, 443 U.S. 595, 603 (1979).

Requiring equal pay or compliance with a minimum wage law pales in comparison to monetary damages. If Perich were allowed to collect damages for wrongful discharge or discrimination, the Church would be penalized for maintaining the religious beliefs underlying the congregation's conclusion that she is no longer fit for ministry. *Madsen v. Erwin*, 481 N.E.2d 1160, 1165 (Mass. 1985) (church-owned newspaper entitled to deference in religiously motivated decision to dismiss a reporter). The Free Exercise Clause prohibits exacting such a harsh penalty for a church's handling of its internal affairs—and so does the Establishment Clause:

> Any award of damages would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious denomination, a result violative of the text and history of the establishment clause.

Schmidt v. Bishop, 779 F. Supp. 321, 332 (S.D.N.Y. 1991).

A. Courts Decline To Interfere In The Relationship Between Minister And Congregant—Uniformly Rejecting Clergy Malpractice Suits.

This case is not about clergy malpractice, but it does involve an inherently religious relationship—one that blends secular and religious components and cannot be adjudicated without breaking and entering the church doors and trespassing on sacred territory.

"[T]he Free Exercise Clause protects religious relationships, including the counseling relationship

between a minister and his or her parishioner...." *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 336 (5th Cir. 1998) ("*Sanders*"). When adjudicating civil claims, courts must guard against intruding on matters of internal church governance. *Watson v. Jones*, 80 U.S. (913 Wall.) 679, 728-729 (1872); *Westbrook v. Penley*, 231 S.W.3d 389, 397 (Tex. 2007). The First Amendment recognizes church and state as separate spheres of sovereignty that "can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum v. Bd. of Ed.*, 333 U.S. 203, 221 (1948). Government burdens the free exercise of religion when it "encroach[es] on the church's ability to manage its internal affairs." *Westbrook v. Penley*, 231 S.W.3d at 395, citing *Kedroff v. St. Nicholas Cathedral*, 344 U.S. at 116.

Clergy malpractice actions would improperly "entangle the courts in the examination of religious doctrine, practice or church polity." *Franco v. The Church of Jesus Christ of Latter-day Saints*, 21 P.3d 198, 204 (Utah 2001) (LDS church defendants allegedly breached a duty to Franco by advising her to "forgive, forget, and seek atonement" or seek help from an unlicensed counselor they recommended). Courts have frequently and uniformly rejected this species of claim, holding that "'a spirit of freedom for religious organizations' prevails...even if that freedom comes at the expense of other interests of high social importance." Constance Frisby Fain, *Article: Minimizing Liability for Church-Related Counseling Services: Clergy Malpractice and First Amendment Religion Clauses*, 44 Akron L. Rev. 221, 241 (2011) ("*Minimizing Liability*"), citing *Westbrook v. Penley*, 231 S.W.3d at 403. *See Dausch v. Rykse*, 52 F.3d 1425, 1432 (7th Cir. 1994) (Ripple, J. concurring in part and

dissenting in part, joined by Coffey, J., concurring) ("Indeed, a cause of action for clergy malpractice has been rejected uniformly by the states that have considered it."); *Sanders*, 134 F.3d at 337 (same). Based on the same rationale, courts have declined to burden religious counselors with a "duty to refer" to secular psychological counselors. *Nally v. Grace Community Church*, 763 P.2d 948, 959 (1988) (family of young man who committed suicide sued the church that provided spiritual counseling); *White v. Blackburn*, 787 P.2d 1315, 1318-1319 (Utah Ct. App. 1990) (no duty to make further inquiry into alleged family conflicts and refer to therapist outside the church).

1. Church-Minister Employment Discrimination Claims Are Closely Analogous To Clergy Malpractice Claims.

Perich's claim is "closely analogous" to the clergy malpractice claims that courts uniformly reject. In both cases, "the government's interest in eradicating discrimination collides with the church's constitutional right to manage its internal affairs free from government interference," and even claims of racial and sexual discrimination must yield. *Westbrook v. Penley*, 231 S.W.3d at 396; *see also EEOC v. Catholic Univ. of Am.*, 83 F.3d at 460. Even where the alleged discrimination is "purely nondoctrinal," intrusion into church governance is "inherently coercive." *Westbrook v. Penley*, 231 S.W.3d at 401-402, citing *Combs v. Central Texas Annual Conference of the United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999) (dismissing minister's Title VII claims of sex and pregnancy discrimination). It would be equally

intrusive for this Court to uphold the Sixth Circuit decision overruling the Church's decision that Perich is no longer fit for religious ministry.

2. Clergy Malpractice Claims Would Entangle Courts In Defining The Legal Duty Of Pastors Across A Broad Spectrum Of Religious Faiths.

The primary hurdle—which courts cannot overcome—is defining the duty of care that is a required element of any negligence claim. *Minimizing Liability*, 44 Akron L. Rev. at 226, 250. "Clergy malpractice theory requires breach of a professional duty unique to that profession." *Hester v. Barnett*, 723 S.W.2d 544, 551 (Mo. App. 1987). Moreover, the theory presupposes that every pastor owes the *same* duty regardless of variations in religious doctrine. *Id.* at 555. Clergy are typically exempt from state licensing requirements. Access to pastoral counseling should not be hindered by state imposed standards, and "the secular state is not equipped to ascertain the competence of counseling when performed by those affiliated with religious organizations." *Nally v. Grace Community Church*, 763 P.2d at 959-960, quoting Ericsson, *Clergyman Malpractice: Ramifications of a New Theory*, 16 Val.U.L.Rev. 163, 176 (1981).

Defining the legal duty of a pastor would require courts to engage in the "constitutionally dubious task of setting a standard of reasonable care for clergymen engaged in counseling" (*Schmidt v. Bishop*, 779 F. Supp. at 324) and to examine "the differing theological views espoused by [a] myriad of religions" (*Nally v. Grace Community Church*, 763 P.2d at 960). Courts would become entangled in evaluating the training

and skills for clergy serving a wide variety of faiths with divergent beliefs—and then have to determine whether a particular pastor's conduct fell below the standard of care. *Sanders*, 134 F.3d at 337; *Franco v. The Church of Jesus Christ of Latter-day Saints*, 21 P.3d at 206. "This is as unconstitutional as it is impossible. It fosters excessive entanglement with religion." *Schmidt v. Bishop*, 779 F. Supp. at 328.[2]

Just as courts may not craft a standard legal duty for pastors who counsel, they cannot construct a minimum standard of competence for religious school teachers or require a church to retain a teacher who no longer meets the criteria to carry out its spiritual mission. Adjudication of Perich's claim would entail an unconstitutional inquiry into the Church's policies for retention and supervision of its commissioned ministers. "The traditional denominations each have their own intricate principles of governance, as to which the state has no rights of visitation." *Schmidt v. Bishop*, 779 F. Supp. at 332.

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[2] Occasionally courts have imposed liability on clergy who "held themselves out" as professional psychological counselors. *Dausch v. Rykse*, 52 F.3d 1425 (pastor held himself out to church member as able to provide secular counseling—and forced her to have sex with him as part of therapy); *Sanders*, 134 F.3d at 334 (two church employees sought counseling from pastor, who represented that he was qualified by education and experience to provide marriage counseling--and then had sex with each of them); *cf. Nally v. Grace Community Church*, 763 P.2d at 950 ("defendants held themselves out as *pastoral* counselors—not as professional, medical or psychiatric counselors"). In both *Dausch* and *Sanders*, pastoral counselors held themselves out as "professionals" and then proceeded to engage in egregious conduct unrelated to their churches' religious doctrine.

3. It Is Both Impractical And Unconstitutional For Courts To Unravel The Secular And Religious Aspects Of a Blended Role—Whether Pastoral Counselor Or Religious Teacher.

One clergy malpractice case is particularly pertinent because it involved a counselor acting in a dual secular-religious capacity—initially as a professional therapist and later as a pastor to the same person. *Westbrook v. Penley*, 231 S.W.3d 389. Perich's teaching role implicates both secular subjects and religious duties. In *Westbrook*, the counselor/pastor owed conflicting duties to the woman he counseled: as a professional counselor, he owed a duty of absolute confidentiality, but as a pastor, he had a religious obligation to disclose the extramarital affair she confessed to him. *Id.* at 391. The Texas Supreme Court cautioned that courts must "avoid...having to determine which acts are done in a secular role and which are done in an ecclesiastical capacity, *particularly when there is such a blend of roles*, as here, that makes it impossible to perceive where one ends and the other begins." *Id.* at 397 (emphasis added). Similarly, Perich's teaching role is a blend of secular and religious duties, not a neat mathematical separation. She teaches religion as well as secular subjects, and she leads religious worship, all in a pervasively religious educational environment. As in *Westbrook* and other "clergy malpractice" cases, "parsing those roles for purposes of determining civil liability...would unconstitutionally entangle the court in matters of church governance and impinge on the core religious function of church discipline." *Id.* at 392. Judicial line drawing is likely to "impinge upon religious tenets or standards of conduct to which the

church and [Perich] have voluntarily bound themselves." *Id.* at 396. Like the pastoral counselor:

> While some degree of overlap and similarity may exist, the religious [teacher] remains distinct and unique from his secular counterpart, approaching [education] from an entirely different perspective.

Comment, *Clergy Malpractice: Making Clergy Accountable to a Lower Power*, 14 Pepperdine L. Rev. 137, 139 (1986).

B. Courts Decline To Interfere In The Relationship Between Church And Congregant—Allowing Churches Autonomy In Matters Of Discipline And Internal Dispute.

A church's disciplinary policies are "unquestionably among those hallowed First Amendment rights with which the government cannot interfere." *Guinn v. The Church of Christ of Collinsville*, 775 P.2d 766, 779 (Okla. 1989) ("*Guinn*"). This Court has long accepted the decisions of ecclesiastical authorities in "questions of discipline, or of faith, or ecclesiastical rule, custom, or law." *Watson v. Jones*, 80 U.S. at 727 (church split between competing factions, both claiming authority as trustees). Although this case is about the Church's discipline of Perich as an employee rather than as a member, there is a common thread: informed consent. Perich freely chose to pursue theological training and then accept the congregation's call to become a commissioned minister. The Free Exercise Clause guards the right to organize and join voluntary religious associations. Those who do so agree to be

bound by its discipline, but "it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed." *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. at 114-115, quoting *Watson v. Jones*, 80 U.S. at 728-729. That is just as true here as it is in the context of a church's discipline of its members.

Informed consent is typically the lynchpin of church discipline cases. In a seminal case decided by the Supreme Court of Oklahoma, a former church parishioner (Guinn) sued church elders for their actions both before and after she withdrew from church membership during the course of a disciplinary proceeding. The elders confronted Guinn about an extramarital relationship and threatened to disclose it to the congregation. The Court's analysis hinged on the principle that:

> When people voluntarily join together in pursuit of spiritual fulfillment, the First Amendment requires that the government respect their decision and not impose its own ideas on the religious organization.... Parishioner's willing submission to the Church of Christ's dogma, and the Elders' reliance on that submission, collectively shielded the church's prewithdrawal, religiously-motivated discipline from scrutiny through secular judicature.

Guinn, 775 P.2d at 774. In addition to protecting the elders' reliance on Guinn's decision to join the church and submit to its discipline, the Free Exercise Clause also protected Guinn's choice to remove herself from membership and withdraw her consent. *Id.* at 779.

Informed consent may either be express or implied through conduct. A person who has never formally joined a church may consent by engaging in its activities with full knowledge of the church disciplinary policies. "[C]hurch membership alone is not dispositive of whether plaintiff consented to the church's practices." *Smith v. Calvary Christian Church*, 614 N.W.2d 590, 687 (Mich. 2000). In *Smith*, the plaintiff expressly consented to the church policies when he joined and later impliedly consented by continuing to actively participate in the church after formally withdrawing his membership.

Where discipline consists of mere exclusion rather than active control and involvement, informed consent is not even necessary. "A church clearly is constitutionally free to exclude people without first obtaining their consent." *Guinn*, 775 P.2d at 781. *See Paul v. Watchtower*, 819 F.2d 875, 879 (9th Cir. 1987) (Jehovah Witnesses' practice of "shunning" a disfellowshipped member is protected by the First Amendment).

Informed consent is one of the guiding stars in this litigation, just as in *Guinn* and other church discipline cases. Perich voluntarily sought training in Lutheran theology. She accepted the Church congregation's call, the title of "commissioned minister," employment as a "called" teacher, and the benefits of the minister's parsonage allowance. She consented to the dispute resolution procedures in the Synod's bylaws. Moreover, the Church congregation was constitutionally free to exclude her from the ministry even without her consent.

CONCLUSION

This case has important ramifications for churches that employ people to carry out its spiritual mission. The Sixth Circuit decision is out of step with decades of precedent concerning the internal affairs and relationships of religious organizations. Unless this Court reverses that decision, even a church's decision to ordain, license, or commission a minister is not safe from state intrusion if the minister becomes disgruntled and decides to sue. *Amicus curiae* urges this Court to guard the First Amendment right of Hosanna Tabor-Lutheran and other churches to select the persons who are integral to achieving its religious purposes.

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH & SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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BRIEF OF LAW AND RELIGION PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

With the joint written consent of the parties filed with the Clerk of the Court, Law and Religion Professors respectfully submit this brief as *amici curiae*.[1]

INTEREST OF *AMICI CURIAE*

Law and Religion Professors include men and women who teach constitutional law, religious studies, and employment discrimination law, who are concerned that the ministerial exception denies equal opportunity and civil rights to thousands of men and women who work for religious employers. They wish to ensure that the range of scholarly views on the ministerial exception – including those that understand the widespread problem of discrimination and the need for legal protection from discrimination – are before the Court. They do not believe that the Religion Clauses require the ministerial exception, and think it ought to be eliminated. A complete list of *amici* is provided in the Appendix.

[1] Pursuant to Rule 37.3(a) of the Rules of this Court, amici file this brief with the consent of all parties, as they have filed consent letters with the Clerk of this Court. Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part, and that no person, other than amici and their counsel, made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The ministerial exception deprives religious employees of basic employment protections and is not required by the Religion Clauses.

The ministerial exception has breathtaking consequences for the civil rights of thousands of men and women who work for religious organizations. Any employee (including elementary and secondary school teachers, school principals, university professors, music teachers, choir directors, organists, administrators, secretaries, communications managers and nurses) at any religious employer (mosque, synagogue, church, school, hospital, nursing home, faith-based social service organization, or other non-profit religious organization) is at risk of losing the protection of the employment laws (including the Americans with Disabilities Act, the Age Discrimination in Employment Act, Title VII, the Pregnancy Discrimination Act, the Equal Pay Act, the Fair Labor Standards Act, the Family & Medical Leave Act, Workers' Compensation laws and state tort and contract law) as long as the employer decides that the employee performs important functions in the religion.

The ministerial exception creates a lawless zone in defiance of *Employment Division v. Smith*'s requirement that the courts not create exemptions from neutral laws of general applicability. As *Smith* warned, such exemptions "make the professed doctrines of religious belief superior to the law of the land, and in effect [] permit every citizen to become

a law unto himself." 494 U.S. at 879. *Smith* would be meaningless unless it applied to religious institutions as well as individuals. Thus the Americans with Disabilities Act, a neutral law of general applicability, can and should be applied to religious organizations.

This Court's church property cases do not require a different result. Any deference to church hierarchy shown in those cases was motivated by a concern that the state would entangle itself in theological or doctrinal disputes. Reliance on that line of cases is also misplaced because it ignores *Jones v. Wolf*, 443 U.S. 595 (1979), the last church property dispute decided by this Court. *Jones* explicitly rejects blanket deference to religious institutions in matters of internal governance. *Jones* further recognized that a deference approach might cause more establishment problems than a neutral principles of law approach.

Hosanna-Tabor illustrates this last point: trying to discern whether Perich is a minister will entangle courts in religious doctrine more than simply adjudicating her retaliation claim. Deciding whether Perich's termination was caused by protected activity, when the school wrote her a letter stating that it intended to fire her because she threatened legal action, does not involve any doctrinal issues.

In contrast, deciding whether Perich's service as a Christian role model for her students is important to the religious mission of the school requires the court to delve into the religious beliefs of the Hosanna-Tabor Evangelical Lutheran Church. Resolving a

theological dispute about the religious role of schoolteachers is precisely the kind of doctrinal issue the courts are incompetent to make, yet the ministerial exception requires such theological analysis in this case.

These consequences can be readily avoided because the Religion Clauses do not require the ministerial exception. The argument that they do ignores *Employment Division v. Smith*'s Free Exercise standard, misinterprets the Establishment Clause, and misunderstands the nature of Perich's retaliation claim.

ARGUMENT

I. THE MINISTERIAL EXCEPTION HAS BREATHTAKING IMPLICATIONS FOR DENYING THE CIVIL RIGHTS OF EMPLOYEES OF RELIGIOUS SCHOOLS AND INSTITUTIONS.

Petitioner's standard, which removes teachers and scores of other employees of religious organizations from the protection of the antidiscrimination, antiretaliation and other employment laws, would be devastating for those employees. A victory for Hosanna-Tabor in these circumstances would be far-reaching in its negative consequences.

A. In defiance of *Employment Division v. Smith*, the lower courts have exempted religious institutions from employment laws and made those institutions a law unto themselves.

In *Smith* this Court warned of the negative consequences if the courts continued to grant constitutional exemptions from neutral laws of general applicability. There would be exemptions "of almost every conceivable kind – ranging from compulsory military service, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws, to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races." *Smith*, 494 U.S. at 888-89 [internal citations omitted]. "The First Amendment's protection of religious liberty," this Court concluded, "does not require this." *Id.*

Smith's prediction about exemptions has come true: a broad array of employment laws is not being applied to thousands of religious organizations and their hundreds of thousands of employees – all because of the ministerial exception.

In the name of the ministerial exception, state and federal courts have exempted religious institutions from the Americans with Disabilities Act, the Age Discrimination in Employment Act, Title VII, the Pregnancy Discrimination Act, the Equal Pay Act, the

Fair Labor Standards Act, the Family & Medical Leave Act, Workers' Compensation laws and state tort and contract law.[2] Thus, despite Congress' clear intent to apply the employment discrimination statutes to religious organizations, the courts have applied the ministerial exception to most of the civil

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[2] *See, e.g.*, *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999) (choir director's ADA claim dismissed); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006) (music director could not bring ADEA claim); *Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008) (priest could not bring Title VII racial discrimination claim); *Petruska v. Gannon University*, 462 F.3d 294 (3d Cir. 2006) (college chaplain could not bring Title VII sex discrimination claim); *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003) (Hispanic Communications Manager could not bring Title VII national origin claim); *Combs v. Central Texas Annual Conference of United Methodist Church*, 173 F.3d 343 (5th Cir. 1999) (former clergy member could not bring pregnancy discrimination claim); *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238 (10th Cir. 2010) (director of the Department of Religious Formation could not bring an Equal Pay Act claim); *Fassl v. Our Lady of Perpetual Help Roman Catholic Church*, No. 05-CV-0404, 2005 WL 2455253 (E.D. Pa. Oct. 5, 2005) (Director of Music precluded from bringing FMLA suit); *McCants v. Alabama-West Florida Conference of United Methodist Church, Inc.*, 372 F. App'x 39 (11th Cir. 2010) (African American pastor could not bring section 1981 race and retaliation claim); *Ross v. Metropolitan Church of God*, 471 F.Supp. 2d 1306 (N.D. Ga. 2007) (Director of Worship Arts (music director) barred from bringing section 1981 claim); *Malichi v. Archdiocese of Miami*, 945 So. 2d 526 (Fla. Dist. Ct. App. 2006) (priest could not bring state workers' compensation claim); *Alcazar v. Corporation of the Catholic Archbishop of Seattle*, 627 F.3d 1288 (9th Cir. 2010) (seminarian could not bring state minimum wage claim); *Friedlander v. Port Jewish Ctr.*, 347 F. App'x 654 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 1714 (U.S. 2010) (rabbi's breach of contract claim dismissed).

rights protection that this country affords to American employees.

Thousands of religious organizations may enjoy exemption from these laws. The United States is the most religiously diverse nation in the world's history, with at least 80 percent of the population self-identifying as religious.[3] The Hartford Institute concludes that there are "roughly 335,000" religious congregations in the United States; about 300,000 of those are Protestant, 22,000 are Catholic and Orthodox, and 12,000 are non-Christian.[4] According to Bureau of the Census estimates, in 2008 government agencies reported that 179,682 religious organizations of all sorts had about 1.7 million paid employees.[5]

In the area of education alone, the United States is home to 22,731 religious elementary and secondary schools employing 314,489 full-time equivalent (FTE) teachers.[6] There are 18,000 teachers in Lutheran

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[3] Barry A. Kosmin and Ariela Keysar, *American Religious Identification Survey 2008*, http://www.americanreligionsurvey-aris.org/reports/highlights.html.

[4] Hartford Institute for Religion Research, *Fast Facts*, http://hirr.hartsem.edu/research/fastfacts/fast_facts.html.

[5] U.S. Census Bureau, Statistics of U.S. Businesses: 2008, http://www.census.gov/epcd/susb/2008/us/US81.HTM.

[6] U.S. Dep't of Education, National Center for Education Statistics, *Characteristics of Private Schools in the United States: Results from the 2009-2010 Private School Universe Survey*, at 7, Table 2, May 26, 2011, http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2011339.

Schools across the United States. Brief for Plaintiff-Appellant EEOC at 44, *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*, United States Court of Appeals for the Sixth Circuit, Nos. 09-1134 & 09-1135. Roman Catholic elementary and secondary schools employ 151,473 full-time equivalent professional staff, of whom 73.9% are lay women, 22.4% lay men and only 3.7% religious.[7] There are at least 820 Jewish and 203 Islamic K-12 schools.[8] Under Petitioner's standard all those teachers, including, ironically, the lay personnel, could become ministers overnight at the discretion of their employers. The threat extends to universities; there are about 900 religiously-affiliated colleges and universities with 1.7 million students in the United States, including 200 Bible colleges, 111 intentionally-Christ-centered colleges, 38 Lutheran colleges, and 235 Catholic colleges and universities.[9] Several courts have already relied upon the ministerial exception to dismiss lawsuits of university professors without

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[7] National Catholic Education Association, *Catholic School Data: United States Catholic Elementary and Secondary Schools 2010-2011*, http://www.ncea.org/news/AnnualDataReport.asp.

[8] U.S. Dep't of Education, National Center for Education Statistics, *Private School Universe Survey*, http://nces.ed.gov/surveys/pss/privateschoolsearch/.

[9] United States Conference of Catholic Bishops, *The Catholic Church in the United States at a Glance*, (figures through 2009) http://www.usccb.org/comm/catholic-church-statistics.shtml; Council for Christian Colleges and Universities, *About CCCU*, http://www.cccu.org/about; Our Colleges, Lutheran Colleges http://www.lutherancolleges.org/.

review of their academic qualifications or employment records.[10]

The number of individuals affected is not limited to ordained clergy. Already the rule has been applied to teachers, principals, communications managers, administrative personnel, music directors, and musicians.[11] Those denied a day in court include whistleblower

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[10] *See, e.g, EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996) (canon law professor's Title VII sex discrimination case dismissed); *Klouda v. Southwestern Baptist Theological Seminary*, 543 F.Supp. 2d 594 (N.D. Tex. 2008) (seminary professor's breach of contract case dismissed); *Hope Int'l Univ. v. Superior Court*, 119 Cal. App. 4th 719 (2004) (psychologists who were Marriage and Family Therapy professors had marital discrimination case dismissed); *McEnroy v. St. Meinrad School of Theology*, 713 N.E.2d 334 (Ind. Ct. App. 1999) (seminary professor's breach of contract and tortious interference case dismissed); *Alicea v. New Brunswick Seminary*, 608 A.2d 218 (N.J. 1992) (theology professor's breach of contract claim dismissed); *Jocz v. Labor & Indus. Review Comm'n*, 538 N.W.2d 588 (Wis. Ct. App. 1995) (seminary director of field education's sex discrimination lawsuit dismissed).

[11] *See, e.g., Clapper v. Chesapeake Conference of Seventh-Day Adventists*, 166 F.3d 1208 (4th Cir. 1998) (elementary school teacher's ADEA claim dismissed); *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999) (choirmaster's ADA claim dismissed); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006) (music director could not bring ADEA claim); *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003) (Hispanic Communications Manager could not bring Title VII national origin claim); *Pardue v. Center City of Consortium Schools*, 875 A.2d 669 (D.C. 2005) (school principal's race and retaliation claim dismissed).

teachers seeking to protect their students[12] and a United Methodist minister who helped his female colleague to draft a sexual harassment complaint.[13] The effect has been especially strong on teachers – elementary and high school teachers, school principals, college and university instructors and professors – whom the courts have turned into ministers, denying them the protection of the disability, age, gender, pregnancy, race, sexual harassment, and breach of contract laws.[14] Petitioner's rule, which would

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[12] *See, e.g.*, *Weishuhn v. Catholic Diocese of Lansing*, 756 N.W.2d 483 (Mich. Ct. App. 2008) (elementary school teacher reporting possible sexual abuse).

[13] *See Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299 (11th Cir. 2000).

[14] *See, e.g.*, *Clapper v. Chesapeake Conference of Seventh-Day Adventists*, 166 F.3d 1208 (4th Cir. 1998) (elementary school teacher's ADEA claim dismissed); *Redhead v. Conference of Seventh-Day Adventists*, 566 F.Supp. 2d 125 (E.D.N.Y. 2008) (elementary school teacher's pregnancy discrimination lawsuit dismissed); *Stately v. Indian Cmty. Sch. of Milwaukee, Inc.*, 351 F.Supp. 2d 858 (E.D. Wis. 2004) (elementary and middle school teacher's race and religion discrimination claim dismissed); *Dayner v. Archdiocese of Hartford*, No. 18468, 2011 WL 3200322 (Conn. Aug. 2, 2011) (school principal's claims dismissed under ministerial exception); *Pardue v. the Center City of Consortium Schools of the Archdiocese of Washington, Inc.*, 875 A.2d 669 (D.C. 2005) (school principal's race and retaliation claim dismissed); *Temple Emanuel of Newton v. Massachusetts Comm'n Against Discrimination*, CIV.A. 09-1950, 2009 WL 1668550 (Mass. Super. June 2, 2009) (Hebrew Day School teacher's age discrimination suit dismissed); *Sabatino v. Saint Aloysius Parish*, 672 A.2d 217 (N.J. Super. Ct. App. Div. 1996) (high school principal's breach of contract claim dismissed); *Coulee Catholic Sch. v. Labor & Indus. Review Comm'n*, 768 N.W.2d

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essentially allow the religious employer to immunize itself from antidiscrimination laws by designating just about any employee a minister, would further expand this denial of protection.

One irony and injustice in the ministerial rule is that women employees of denominations that do not ordain women suddenly become ministers at the moment they file a lawsuit. Although some Roman Catholic, Muslim and Orthodox Jewish women may not become priests, imams, or rabbis and perform their jobs with full understanding that they cannot be ministers, the courts and churches confer ministerial status upon them just long enough to keep their lawsuits out of court.[15]

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868 (Wis. 2009) (first grade teacher's age discrimination case dismissed).

[15] Cases involving Catholic women deemed ministers for purposes of the ministerial exception include: *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006) (non-ordained chaplain assured women were eligible for her position); *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003) (Catholic communications director); *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238 (10th Cir. 2010) (Catholic Director of Religious Formation); *Musante v. Notre Dame of Easton Church*, CIV.A. 301CV2352MRK, 2004 WL 721774 (D. Conn. Mar. 30, 2004) (Director of Religious Education); *Pardue v. the Center City of Consortium Schools of the Archdiocese of Washington, Inc.*, 875 A.2d 669 (D.C. 2005) (school principal); *Archdiocese of Miami, Inc. v. Minagorri*, 954 So. 2d 640 (Fla. Dist. Ct. App. 2007) (school principal); *Brazauskas v. Fort Wayne-S. Bend Diocese, Inc.*, 796 N.E.2d 286 (Ind. 2003) (Director of Religious Education); *Weishuhn v. Catholic Diocese of Lansing*, 756 N.W.2d 483 (Mich. Ct. App. 2008) (elementary school teacher);

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Individual American clergy also deserve the protection of the laws that shield their fellow citizens. Petitioner argues that church control over its ministers is absolute while ignoring the troubling consequences of church autonomy for individual members of the clergy. Petitioner's rule automatically removes clergy from legal protection, leaving them subject to sexual harassment, discrimination, and wage and hour violations. Reverend Pamela Combs' pregnancy discrimination case was dismissed under the ministerial exception, for example, even though the United Methodist Church had returned her to lay status in order to end her insurance coverage. *Combs v. Central Texas Annual Conference of United Methodist Church*, 173 F.3d 343 (5th Cir. 1999). Rabbi Leavy and Sister Rosati were terminated for foot surgery and breast cancer, respectively, but could not litigate their disabilities claims. *Leavy v. Congregation Beth Shalom*, 490 F.Supp. 2d 1011 (N.D. Iowa 2007); *Rosati v. Toledo, Ohio Catholic Diocese*, 233 F.Supp. 2d 917 (N.D. Ohio 2002); *see also Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007); *Werft v. Desert Sw. Annual Conference of United Methodist Church*, 377 F.3d 1099 (9th Cir. 2004); *Cronin v. S. Indiana Annual Conference*, 1:05 CV 1804 LJM WTL,

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Sabatino v. Saint Aloysius Parish, 672 A.2d 217 (N.J. Super. Ct. App. Div. 1996) (high school principal); *Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, Dept. of Workforce Dev.*, 768 N.W.2d 868 (Wis. 2009) (first grade teacher).

2007 WL 2258762 (S.D. Ind. Aug. 3, 2007) (all dismissing disabilities cases because of the ministerial exception).

The sexual harassment, antiretaliation and minimum wage cases demonstrate that male and female seminarians and clergy may require legal protection from their church supervisors and colleagues. The courts are currently divided on applying the ministerial exception in the sexual harassment context. *Compare Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004) (allowing sexual harassment claim) *with Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1245 (10th Cir. 2010) (rejecting *Elvig*). A Mexican seminarian who moved to Washington State and performed maintenance work as part of his duties was denied the protection of sexual harassment, antiretaliation and state minimum wage laws simply because he was a seminarian. *See Alcazar v. Corporation of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1292-93 (9th Cir. 2010). A ruling for Petitioner by this Court would imply that seminarians, clergy and rabbis may be harassed and exploited at work without legal remedy as the courts protect the churches' autonomy from the law rather than the rights of individual employees.

In none of the cited cases did the religious defendants argue that their religious tenets required discrimination, sexual harassment, or other illegal conduct. Some courts have understood this point and demonstrated that the employment laws can be applied to religious employees, including teachers,

without adverse effect on religious freedom.[16] The courts are capable of adjudicating employment cases against religious organizations without need of the ministerial exception.

B. The ministerial exception undermines our country's strong commitment to civil rights for all.

Petitioner emphasizes the need for members of religious organizations to resolve their conflicts internally, without court review, and without regard to neutral laws of general applicability. However "[e]mployment discrimination cases are simply not 'internal' matters." Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. Rev. 391, 408-409 (1987). As Professor Lupu observed in criticizing the ministerial exception three years before *Smith* was decided, the enforcement of antidiscrimination laws not only protects plaintiffs but also serves public and third party interests: "Religious institutions . . . are influential in shaping behavior and moral convictions. The way in which such institutions treat

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[16] *See, e.g., DeMarco v. Holy Cross High Sch.*, 4 F.3d 166 (2d Cir. 1993) (high school teacher allowed to sue for age discrimination); *Longo v. Regis Jesuit High Sch.*, 02-CV-001957-PSF-OES, 2006 WL 197336 (D. Colo. Jan. 25, 2006) (ADA claim allowed for high school teacher); *Welter v. Seton Hall Univ.*, 608 A.2d 206 (1992) (computer professors allowed to sue a Catholic university for breach of contract).

women or racial minorities is likely to have significant consequences in other spheres of life. Those who may suffer these consequences thus have a vital interest in the behavior of religious institutions." *Id.* Given these important public interests, "these disputes cannot reasonably be perceived as 'internal.'" *Id.*

The antidiscrimination laws reflect these public interests. Congress has chosen to apply civil rights laws to religious organizations. In passing the landmark Title VII of the Civil Rights Act of 1964, for example, Congress exempted religious organizations from lawsuits for religious discrimination but allowed them to be sued for race, color, sex and national origin discrimination. *Feldstein v. Christian Science Monitor*, 555 F.Supp. 974, 976 (D. Mass. 1983); 42 U.S.C. §§ 2000e-1(a), 2000e-2(e). Congress made a similar choice in the Americans With Disabilities Act, 42 U.S.C. §§ 12113(d)(1)-(d)(2), 12203, choosing not to exempt religious organizations from the statute's retaliation provision, and ensuring protection for all the estimated 5,903,000 persons with disabilities in the labor force.[17] Finally, both Congress and this Court have recognized the particular importance of enforcing the antiretaliation provisions of all the civil rights laws. *See, e.g., Thompson v. North American*

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[17] Bureau of Labor Statistics, Labor Force Statistics, *Table A-6: Employment Status of the Civilian Population by Sex, Age and Disability Status, Not Seasonally Adjusted*, Feb. 5, 2010, http://www.bls.gov/webapps/legacy/cpsatab6.htm.

Stainless, LP, 131 S. Ct. 863, 868 (2011) ("Title VII's antiretaliation provision must be construed to cover a broad range of employer conduct."); *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) ("Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends.").

The courts have held that these laws may be applied to religious schools without violating free exercise or establishment principles. For example, religious schools have been ordered to comply with Title VII and the Equal Pay Act even though their religious tenets regard married men as heads of households and require providing them with better health insurance or salaries than married women. *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986); *EEOC v. Tree of Life Christian Sch.*, 751 F.Supp. 700 (S.D. Ohio 1990). Religious employers have been required to obey the child labor laws, *see Brock v. Wendell's Woodwork, Inc.*, 867 F.2d 196 (4th Cir. 1989), and the minimum wage laws, *see Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985).

Thus the consequences of upholding the ministerial exception are not only devastating to the thousands of men and women who work for religious organizations, but also detrimental to the broad and fair enforcement of the civil rights statutes. The rule is also unnecessary; neither the Free Exercise Clause nor the Establishment Clause requires it.

II. THE FREE EXERCISE CLAUSE DOES NOT REQUIRE THE MINISTERIAL EXCEPTION.

A. *Employment Division v. Smith* held that neutral laws of general applicability like the Americans with Disabilities Act do not violate the Free Exercise Clause.

In *Employment Division v. Smith*, 494 U.S. 872 (1990), this Court held that so long as a law is neutral and generally applicable, it does not violate the Free Exercise Clause even if it imposes a substantial burden on religion. *Id.* at 879. *Smith* itself upheld a law that prohibited a religious sacrament. *Id.* at 874, 890. Because the Americans with Disabilities Act is unquestionably both neutral and generally applicable, *Smith* should defeat any free exercise justification.

Hosanna-Tabor asserts that *Smith* applies only to individual free exercise claims and not to institutional ones, relying on a single line from *Smith* stating that "the government may not . . . lend its power to one or the other side in controversies over religious authority and dogma." *Id.* at 877. Hosanna-Tabor reads the phrase "religious authority" as a reference to church hierarchy and those who lead the church and then concludes that *Smith* does not apply to cases involving ministers. Thus, Petitioner argues, while a religious individual may not violate a neutral law of general applicability, a religious organization may.

The quoted phrase cannot possibly bear this weight. The Court's language about "lend[ing] its power to one or the other side in controversies over religious authority and dogma" refers to the Establishment Clause constraint against the courts' selecting one side over another when dealing with a theological or doctrinal conflict between religious factions. As discussed below, the sentence alludes to a line of cases dealing with the disposition of church property, where, unlike here, the Court was faced with the actual prospect of resolving doctrinal disputes. Those cases say nothing about how to resolve a conflict between a religious entity and a neutral law of general applicability. *Smith* addresses *that* question simply and directly: The religious entity must bend to the law.

B. The history and text of the Free Exercise Clause do not support the ministerial exception.

Petitioner and their *amici* conclude that religious employers must be exempted from neutral laws of general applicability because of a historical tradition of church autonomy from government interference that is protected by the First Amendment. Yet history does not support this claim.

First, "nothing in the debates or early drafts of the religion clauses gives the slightest support to the concept of corporate free exercise exemptions." Lupu, 67 B.U. L. Rev., at 419; *see also* Marci A. Hamilton,

Religious Institutions, the No-Harm Doctrine, and the Public Good, 2004 B.Y.U. L. Rev. 1099, 1133-34 (2004) (the Constitution requires churches to obey the rule of law). Instead, James Madison feared the power of both state and church; late in life he warned against "the potential abuse of ecclesiastical corporate power." Forrest Church, *So Help Me God: The Founding Fathers and the First Great Battle Over Church and State* 355 (2007). Even Protestant clergy of the revolutionary era supported the First Amendment because they understood that "[p]ower, civil *and ecclesiastical*, has to be deflated, diffused, and properly related in order to keep it from becoming absolute, arbitrary and abused." James H. Smylie, *Protestant Clergy, the First Amendment and the Beginnings of a Constitutional Debate, 1781-91, in* The Religion of the Republic 153 (Elwyn A. Smith, ed., 1971) (emphasis added).

Second, the idea that the Free Exercise Clause offers greater protection to religious institutions than to religious individuals contradicts the commonly recognized idea that liberty of conscience is the fundamental principle underlying the Free Exercise and Establishment Clauses. *See* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. Rev. 346 (2002). As the late constitutional scholar Philip Kurland concluded, "[l]imited powers of government were not instituted to expand the realm of power of religious organizations, but rather in favor of freedom of action and thought by the people."

Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. Chi. L. Rev. 1, 4 (1961).

Interpreting the Free Exercise Clause to protect religious institutions' rights against their members ignores the experience of the earliest Americans. "The American Revolution broke many of the intimate ties that had traditionally linked religion and government, . . . , and turned religion into a voluntary affair, a matter of individual free choice." Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789-1815* 576 (2009). Americans of that era broke away from traditional religious organizations and pursued individual liberty. *Id.* at 609-13. They "believed that the individual, not the state *or the church*, should decide matters of faith." Frank Lambert, *The Founding Fathers and the Place of Religion in America* 180 (2003) (emphasis added). Allowing the courts to enforce a rule that automatically favors religious institutions over their members is at odds with this history of liberty of conscience.

In short, it would contradict history to conclude that the Free Exercise Clause requires protecting religious institutions absolutely from neutral laws of general applicability while not protecting religious individuals at all.

C. The church property cases do not establish a broad rule of deference to church hierarchy in matters of internal governance.

Hosanna-Tabor also argues that this Court's decisions in the church property cases support its view that the Free Exercise Clause mandates the ministerial exception. They do not. The church property cases, including those mentioned in *Smith*, do not hold that courts must absolutely defer to the church in matters of internal church governance. Instead, the decisions focus on avoiding entanglement in church doctrine. In addition, the most recent church property case, *Jones v. Wolf*, 443 U.S. 595 (1979), explicitly rejects mandatory deference even in cases involving internal church affairs.

1. The main concern of the church property cases was the fear that courts would decide doctrinal and theological issues.

On the rare occasions when the Court has deferred to church hierarchy, it did so to avoid entangling itself in theological or doctrinal disputes.[18] As

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[18] *See, e.g., Jones v. Wolf*, 443 U.S. 595, 602 (1979) ("The First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes. *Most importantly*, the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice.") (emphasis added). *See also, e.g.*, Frederick

(Continued on following page)

the Court noted in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1968): "not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment. . . . But First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice." *Id.* at 449.

In fact, in *Presbyterian Church*, the first church property case cited in *Smith*, the Supreme Court did not actually defer to church hierarchy. Instead, the Court invalidated a Georgia law that required the courts to resolve a property dispute between a general church and breakaway local churches by deciding whether the general church had departed from the religious tenets it held at the time the local churches first affiliated with it. 393 U.S. at 440, 441, 449-50.

Similar entanglement concerns explain the holdings of the two other property cases cited by *Smith*. In *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952), the Court opted for deference to the highest church body after rejecting the New York legislature's finding that one faction would better carry out the

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Mark Gedicks, *The Recurring Paradox of Groups in the Liberal State*, 2010 Utah L. Rev. 47, 57; Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 Geo. J. Law & Pub. Pol'y 119, 132 (2009).

church's mission. *Id.* at 106 n.10, 107-09, 117-18. In *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), the Court declined to rule on whether the church properly applied its *own* policies. Notably, the cases do not address whether a court has the competence to rule on whether the church failed to abide by the *state's* laws.

2. *Jones v. Wolf*, the most recent church property case, rejects mandatory deference in cases involving internal church governance.

Petitioner's reliance on the church property cases is further misplaced because it ignores *Jones v. Wolf*, 443 U.S. 595 (1979), the last church property dispute decided by this Court. As the most recent case involving churches rather than individuals, *Jones*'s precedential value cannot be ignored. *Jones* explicitly rejects blanket deference to religious institutions.

Like previous church property disputes, *Jones* involved a schism within a church. A majority of the Vineville church in Macon, Georgia, voted to separate from the Presbyterian Church in the United States. 443 U.S. at 598. Both the majority congregation and the minority that wished to remain affiliated with the Presbyterian Church in the United States claimed the church property as their own. *Id.*

This Court rejected a rule requiring it to defer to the church hierarchy of the Presbyterian Church in the United States: "We cannot agree, however, that

the First Amendment requires . . . a rule of compulsory deference to religious authority in resolving church property disputes, even when no issue of doctrinal controversy is involved." 443 U.S. at 605.

Instead, the Supreme Court endorsed as one option a neutral principles of law approach. *Id.* at 604 ("We therefore hold that a State is constitutionally entitled to adopt a neutral principles of law approach as a means of adjudicating a church property dispute.").[19] In other words, the Court endorsed resolving the church property dispute in the same manner that it would deal with a secular organization. Thus, the Court approved "examin[ing] the deeds to the properties, the state statutes dealing with implied trust, and the Book of Church Order to determine whether there was any basis for a trust in favor of the general church." *Id.* at 600.

The *Jones* Court did recognize that Establishment Clause issues may arise when applying a neutral principles of law approach. *Id.* at 604 ("This is not to say that the application of the neutral-principles approach is wholly free of difficulty."). Nevertheless, the neutral principles of law approach

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[19] This neutral principles of law approach was also approved in the first "church autonomy" case cited in *Smith*: "And there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded." *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969).

is constitutional "so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith." *Id.* at 602. Thus, simply because an Establishment Clause issue may arise in adjudicating a particular type of claim does not mean the court must forever abandon trying to resolve such a claim using neutral principles of law.

Furthermore, the *Jones* Court recognized that a deference approach does not eliminate all Establishment Clause problems. When church structure is ambiguous, determining which unit of church governance has ultimate control might well result in entanglement with church doctrine. 443 U.S. at 605. In that case, it is actually the neutral principles of law approach that can best avoid entanglement because it "obviates the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes." *Id.* at 605.

In sum, neither *Smith* nor the church property cases that preceded it require deference to Hosanna-Tabor in its dealings with Cheryl Perich. Instead, a court may resolve Perich's retaliation claim in the same way it resolves any other retaliation claim. Only if adjudication of this claim entangles the court in theological or doctrinal questions should the courts opt for deference to church authorities. This is especially true where, as *Jones v. Wolf* acknowledges, a deference approach might actually cause more Establishment Clause ills than a neutral principles of law approach.

III. THE ESTABLISHMENT CLAUSE DOES NOT REQUIRE THE MINISTERIAL EXCEPTION.

Hosanna-Tabor asserts that resolving discrimination claims would violate the Establishment Clause because adjudicating them would entangle the courts with religion by requiring courts to evaluate a minister's spiritual qualifications or determine whether a minister sufficiently embodies the church and its teachings. Yet, even assuming that some employment discrimination cases could present such issues, not all do and this one certainly does not. On the contrary, applying the ministerial exception to Perich's claim requires the Court to resolve theological disputes. Consequently, the Establishment Clause cannot justify the blanket immunity of the ministerial exception.

A. Resolving Perich's retaliation claim does not require the Court to decide any doctrinal or theological questions.

Hosanna-Tabor incorrectly assumes that adjudicating ministers' antidiscrimination claims will require courts to decide questions beyond their institutional competence. A court may decide Perich's retaliation claim without ever becoming entangled in doctrinal or theological questions. In order to prevail, Perich must prove: (1) she engaged in activity protected by the ADA; (2) she suffered a materially adverse action; and (3) there was a causal link between the protected activity and the adverse action. *See, e.g.*, *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 516 (6th Cir. 2009);

Bryson v. Regis Corp., 498 F.3d 561, 577 (6th Cir. 2007). These elements are easily met and do not implicate any religious doctrine.

Perich's protected activity was asserting her legal rights under the ADA, and the adverse action was her termination. As in most retaliation cases, the pivotal question is whether the assertion of her legal rights caused her termination. It is undisputed that Hosanna-Tabor sent Perich a letter stating it was terminating her because she had acted disruptively and threatened to sue. *Hosanna-Tabor*, 597 F.3d at 774. Thus, Perich has direct evidence of retaliation.

Hosanna-Tabor nevertheless argues that there is a religious question because Perich was fired for being insubordinate and spiritually unfit. Petition for Writ of Certiorari of Defendant-Petitioner at 6, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, No. 10-553 (6th Cir. Mar. 28, 2011) (arguing Perich was fired "because her insubordination and threats of litigation violated Church teaching"). First, the school argues, Perich had been unruly and disruptive when asserting her legal rights, thereby ruining her relationship with the school. *Hosanna-Tabor*, 597 F.3d at 774. Second, instead of trusting the church's mandatory internal dispute resolution process, Perich sued in court.

These arguments lack merit. Terminating an employee for asserting her legal rights is the very definition of retaliation, and is illegal no matter how disruptive, insubordinate, or infuriating the employer

may find it. Next, any contract that purports to waive an employee's right to sue for an ADA violation is void as against public policy. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 50-51 (1974) (employees may not by contract prospectively waive their civil rights). That is, a contractual provision stipulating that all discrimination claims will be resolved internally rather than before a neutral third party is unenforceable.

Moreover, Petitioner's argument boils down to this assertion: A religious organization should be able to proclaim ministers spiritually unfit any time that they assert their legal rights or insist that the church follow the law, and for the secular courts to disagree with this assessment violates the Establishment Clause.

Petitioner's argument is incorrect. A court could resolve this retaliation claim without entangling itself in theology or doctrine. A court could analyze whether Hosanna-Tabor's alleged religious motivation was merely a pretext for discrimination. Indeed, in *Ohio Civil Rights Commission v. Dayton*, 477 U.S. 619 (1986), a case that parallels this one, this Court gave its blessing to a pretext analysis. In that case, a Christian school told a pregnant teacher she could not return to school the following year because of its belief that mothers should stay home with their preschool children. *Id.* at 623. When she threatened litigation, the school fired her for violating the mandatory internal dispute resolution provision in her contract, arguing that Christians should not sue other Christians. *Id.* at 622-23. Although the ultimate holding focused on abstention issues, the Court noted

that "[t]he Commission violates no constitutional rights by merely investigating the circumstances of [the schoolteacher's] discharge in this case, if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge." *Id.* at 628.[20]

Alternatively, a court could accept Hosanna-Tabor's argument that it was religious considerations and not pique or financial considerations[21] that motivated Perich's dismissal in this case, and still hold that the church violated the law. This is because Hosanna-Tabor's claim that Perich was spiritually unfit because she threatened legal action does not in fact deny that the termination was retaliatory. Instead, the argument is that the retaliation is religiously required. Nonetheless, it is still an admission of retaliation.

In this scenario, to the extent there is a religious question, it is a free exercise question. The question for a court is not interpreting religious doctrine or tenets, or even ascertaining the school's real motives, but deciding whether a neutral law of general applicability (retaliation is illegal) supersedes a religious obligation (retaliation is religiously required).

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[20] *See also* Caroline Mala Corbin, *Above the Law: The Constitutionality of the Ministerial Exception*, 75 Fordham L. Rev. 1965, 2016-22 (2005) (explaining in detail why pretext analysis does not require courts to become entangled in theological or doctrinal issues).

[21] During Perich's leave, the school hired a replacement for the rest of the year instead of a more limited time frame.

Under *Smith*, as long as the law is neutral and generally applicable, it may substantially burden a religious practice. That Hosanna-Tabor may not be able to follow the dictates of its religion in terminating an employee is no different from a Free Exercise standpoint than the individuals in *Smith* not being able to perform the sacrament their religion requires.

This is not to say that the First Amendment provides no protection for the church-minister relationship. In *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), this Court held that the Boy Scouts' freedom of association right to exclude gays as scoutmasters in order to convey an anti-homosexual message trumped state antidiscrimination law. *Id.* at 653-56. Depending on how the Court weighs the state's antidiscrimination goals against the religious institution's free speech rights, the same principle could apply to religious organizations who, for example, limit their clergy positions to men on the grounds that admitting women would undermine their religious messages about the nature of ministry. Thus, if the ministerial exception were eliminated, some protection for clergy hiring decisions remains under freedom of association.[22]

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[22] Any protection provided by the freedom of association would be much narrower than the current ministerial exception. *Dale* protects *expressive* association, allowing the organization to convey its viewpoint. Therefore, if a minister was fired because of her disability (or age or race or sex), and the church employer has no religious tenets requiring dismissal of people due to

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Of course, even before *Smith* (and even after *Dale*) the fact that a law burdened a religious tenet did not guarantee an exemption from that law. Courts have rejected arguments that religious organizations should be exempt from retaliation claims because of their religious beliefs about litigation. *See, e.g.*, *EEOC v. Pacific Press Publishing Association*, 676 F.2d 1272, 1280 (9th Cir. 1982) (rejecting Seventh Day Adventists' free exercise claim for religiously required retaliation on the grounds "the government's compelling interest in assuring equal employment opportunities justifies this burden"). To allow religious institutions to retaliate and to accept the school's all-litigious-ministers-are-spiritually-deficient argument means that a church would be able to dismiss as insubordinate and spiritually unfit a minister who was raped by a coworker and brings a sexual assault charge. A church would be able to terminate without interference a minister who threatens to sue after the church breaches its contract and fails to pay the agreed-upon salary. Likewise, a church or religious school or religious hospital would be able to fire as insubordinate and spiritually unfit a minister who reports to civil authorities any wrongdoing, whether it be embezzlement or negligence or the sexual abuse of children. In short, letting a religious organization claim that a minister who insists on compliance with the law is spiritually unfit creates a potentially

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disability (or age or race or sex), then there should be no First Amendment problem letting her resume her post.

limitless loophole that makes each church a "law unto itself." *Cf. Smith*, 494 U.S. at 879.

B. Deciding whether Perich is a minister does entangle the Court in doctrinal and theological disputes and violates the Establishment Clause.

The irony of this case is that while resolving this retaliation suit will not embroil the court in theological or doctrinal disputes, applying the ministerial exception will. Thus, this case presents an example of how a church autonomy/deference approach presents more Establishment Clause problems than a neutral principles of law approach.

To trigger the ministerial exception, the plaintiff in a discrimination suit must be a "ministerial" employee. In determining who counts as a ministerial employee, courts do not simply accept a religious employer's characterization of a position, as it could insist that all its employees were ministers. *See, e.g.*, *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1396 (4th Cir. 1990) (school claimed that all teachers "consider teaching to be their personal ministry").

Instead, courts take a functional approach. In the Sixth Circuit, Perich is a minister if her "primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 772 (6th Cir. 2010).

This query necessarily requires the court to determine whether a position is important to the spiritual and pastoral mission of the church. But in order to decide whether Perich's primary teaching duties are important to the spiritual and pastoral mission of the church, the court might have to delve into the religious beliefs of the Evangelical Lutheran Church.

Teaching religion class and leading prayers are clearly religious activities, and would readily qualify as religious duties. Yet these tasks account for only approximately 45 minutes out of Perich's seven-hour work day, or roughly 11% of her time. If those were her only religious duties, then she would not count as a minister under the primary duties test.

However, Hosanna-Tabor argues that, in addition to the time spent performing religious duties, Perich serves as a Christian role model for her students – an activity she performs all day every day. If that is a religiously important function, then she may well qualify as a minister under the primary duties test. But whether serving as a role model is religiously important – not whether it is important in general, but whether it is important to the Hosanna-Tabor Evangelical Lutheran Church's spiritual and pastoral mission – is not a question the courts should answer. Courts should not be in the position of mediating a dispute about what is or is not important to a church's pastoral mission or resolving a theological dispute about the religious role of schoolteachers.

Hosanna-Tabor concedes that the primary duties test invites Establishment Clause problems. Petition for Writ of Certiorari of Defendant-Petitioner at 16, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, No. 10-553 (6th Cir. Mar. 28, 2011) (agreeing that forcing courts to decide which duties are secular and which are religious leads to religious entanglement). To mitigate these problems, it suggests that the primary duties test should be replaced with a religious duties test, where the question is whether the employee performed any important religious duties. Brief of Defendant-Petitioner at 22, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, No. 10-553 (June 13, 2011). Although this proposed solution expands the ministerial exception, it does not solve the underlying Establishment Clause problems.

To start, unless the courts are willing to categorize as a minister anyone who performs even one religious task, courts still have to draw a quantitative line somewhere. Otherwise a school can make everyone a minister by ensuring that each and every school employee, from the janitor to the bookkeeper to the P.E. teacher, leads a prayer at least once or twice during the school year. As a result, no one who works for a religious school, hospital, nursing home, social service organization or house of worship would have any employment protections.

In any event, changing the threshold amount of religious duties required does not alter the fact

that courts might still have to determine whether a particular duty was religiously important or not. What if Perich taught only secular subjects? What if she were the school nurse? What if instead of a schoolteacher for the Evangelical Lutheran Church she served as its music director? In order to decide whether a music director is a minister, the court would have to rule on the religious significance of music in the Evangelical Lutheran Church. *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 802 (4th Cir. 2000). Deciding whether music is integral to a denomination's worship services or significant enough such that teaching it makes one a minister is exactly the kind of theological decision the courts are incompetent to make, yet they are exactly the kind of decision application of the ministerial exception requires. *See, e.g., Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 797 (9th Cir. 2005) (Kozinski, J., concurring in the denial of rehearing en banc) ("The very invocation of the ministerial exemption requires us to engage in entanglement with a vengeance.").

CONCLUSION

People who wish to serve their God should not have to choose between their calling and their civil rights. Yet the ministerial exception essentially strips ministers of protection against discrimination based on race, sex, age, and, as here, disability, and leaves them outside the shelter of the Family Medical Leave

Act, the Fair Labor Standards Act, the Equal Pay Act, and a host of other protective employment laws.

This absolute immunity from lawsuits cannot be justified by either the Free Exercise Clause or the Establishment Clause. The Americans with Disabilities Act is a neutral law of general applicability, and therefore does not violate the Free Exercise Clause. To the extent that Perich's case raises Establishment Clause problems, it is deciding whether she is a minister that raises them, not deciding whether the school retaliated against her.

Jones v. Wolf approves a better approach: Apply employment discrimination law to a religious employer in the same way it would be applied to a secular employer. If a theological or doctrinal question comes up, defer to the religious institution on that issue. Notably, accepting the employer's answer to a theological question does not guarantee that the religious employer will prevail. Even if it violates religious tenets to pay ministers the minimum wage, a religious school might still be required to do so. *Cf. Tony and Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985). That it may violate religious tenets for ministers to assert their legal rights does not automatically mean a religious employer can, with complete impunity, fire a minister for doing so. That is the holding of *Employment Division v. Smith*:

religion is no longer grounds for exemptions from neutral laws of general applicability.

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE LUTHERAN CHURCH — MISSOURI SYNOD AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The Lutheran Church—Missouri Synod ("the Synod") is the second largest Lutheran denomination in America. It has roughly 2.4 million baptized members. It includes approximately 6,000 congregations, including the petitioner Hosanna-Tabor Evangelical Lutheran Church and School. The Synod's hallmark is its steadfast adherence to orthodox Lutheran theology and practice.

The Synod places great importance on the Christian education of its children and on introducing other children of willing parents to the Gospel of Jesus Christ. The Synod operates one of the largest Protestant religious school systems in the United States, and its roster of commissioned ministers today includes more than 10,000 teachers.

This case raises important questions about the Synod's views on commissioned ministers and dispute resolution. The Synod submits this *amicus* brief to outline its relevant religious beliefs and practices, especially its strongly held views on commissioned ministers and dispute resolution, both of which have long histories and deep theological importance.

The Synod's religious views about church structure and governance go back centuries and are deeply grounded in theological understandings of God's will, as revealed by Scripture and as traditionally understood by the church. Explaining the theological and historical roots of the Synod's views is thus the purpose of this brief.[1]

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No

ARGUMENT

I. The Role of Commissioned Ministers

We begin by discussing the nature of commissioned ministry and by examining the theological concepts and history associated with ministers generally and with commissioned ministers specifically. We then turn to the current role of commissioned ministers in the life of the Synod.

A. Ministers and the Divine Call

Like many Christian denominations, the Synod fervently believes in a divinely established ministerium in which individual ministers are first called by God and then ordained by the church to do God's work. The biblical basis for a divinely established ministerium goes back to Jesus selecting his disciples, impressing them into service, and conferring on St. Peter the keys to the kingdom. *See, e.g.*, *Matthew* 4:18-21, 10:1-41, 16:13-20. In this view, ministers are not chosen by human beings. Rather, they are chosen by God; human beings merely recognize that certain individuals have already been selected for the ministry by God. *See, e.g.*, *Acts* 20:28 ("Pay careful attention to yourselves and to all the flock, in which *the Holy Spirit* has made you overseers . . .") (emphasis added); *Galatians* 1:1 ("[N]ot from men nor through man, but through Jesus Christ and God the Father[.]"). The Synod's Commission on Theology and Church Relations puts it this way:

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person other than the *amicus*, or its counsel, made a monetary contribution intended to fund its preparation or submission. All parties, other than the Solicitor General, have filed blanket waivers with the Court consenting to the submission of all *amicus* briefs. The consent of the Solicitor General is being submitted herewith.

> It is God who calls an individual to serve the ministry of the Word within the office . . . . But the call also has a human dimension in that God entrusts the task of calling to human beings . . . . Although the divine character of the call is primary, the human activity by which the divine call is issued is not without importance.

The Lutheran Church—Missouri Synod Commission on Theology and Church Relations, *The Theology and Practice of "The Divine Call"* 26 (2003) (hereinafter "LCMS Commission on Theology, *The Divine Call*"), *available at* http://www.lcms.org/Document.fdoc?src=lcm&id=410.[2]

As a result, unless one is first chosen by God to be a minister (that is, unless one has received a "call"), one simply cannot serve in the role of minister. *See Augsburg Confession*, Article XIV (1531), *available at* www.lcms.org/Document.fdoc?src=lcm&id=956 ("Of Ecclesiastical Order they teach that no one should publicly teach in the Church or administer the Sacraments unless he be regularly called."); Martin Chemnitz, *Ministry, Word, and Sacraments: An Enchiridion* 30 (1593) (English trans. 1981) ("There is no legitimate or ordinary call

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2. By way of introduction, the Commission on Theology and Church Relations was established in 1962 by the Lutheran Church—Missouri Synod in order to "provide guidance to the Synod in matters of theology and church relations." *Handbook of the Lutheran Church—Missouri Synod* § 3.9.6.2.1, at 176 (2004) (hereinafter "*LCMS Handbook*"), *available at* www.lcms.org/Document.fdoc?src=lcm&id=926. The Commission consists of 20 members—16 voting and 4 not voting—including ordained ministers, a commissioned minister who is a parish teacher, laypeople, seminary faculty, and the President and First Vice-President of the Synod. *Id.* § 3.9.6.1, at 175.

to the ministry except from God[.]"). On this point, the Catholic and Lutheran churches generally agree, although Lutherans believe strongly that congregations have the power to recognize God's call and ordain ministers for themselves, without permission from the Pope or bishops. This disagreement goes back to the Reformation. *See The Power and Primacy of the Pope* (1537), *in Concordia: The Lutheran Confessions* 304 (2d ed. 2005) (noting that if the bishops are unable or unwilling to appoint suitable people, "the churches are in duty bound before God, according to divine law, to ordain for themselves pastors and ministers"); *Chemnitz*, *supra*, at 30 (noting that "[a]t all times there have been great, often also bloody, controversies regarding the right to call").

B. The Two Types of Called Ministers

The Lutheran Church teaches that there are two types of called ministers. First, there are ordained ministers, who serve in the office of public ministry (also known as the pastoral office) and have the power to preach the Word and administer the Sacraments. Second, there are commissioned ministers, who act as auxiliaries to the pastoral office, performing certain important functions of that office (though ordinarily not the administration of Sacraments or the preaching of the Word). *See, e.g.*, The Lutheran Church—Missouri Synod Commission on Theology and Church Relations, *The Ministry: Offices, Procedures and Nomenclature* 4-6 (1981) (hereinafter "LCMS Commission on Theology, *The Ministry*"), *available at* www.lcms.org/Document.fdoc?src=lcm&id=423. This two-tiered structure of called ministers may be unfamiliar to some, but the Synod sees it as grounded in Scripture, most clearly in the Book of Acts:

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> [1] Now in these days when the disciples were increasing in number, a complaint by the Hellenists arose against the Hebrews because their widows were being neglected in the daily distribution. [2] And the twelve [apostles] summoned the full number of the disciples and said, "It is not right that we should give up preaching the word of God to serve tables. [3] Therefore, brothers, pick out from among you seven men of good repute, full of the Spirit and of wisdom, whom we will appoint to this duty. [4] But we will devote ourselves to prayer and to the ministry of the word." [5] And what they said pleased the whole gathering, and they chose Stephen, a man full of faith and of the Holy Spirit, and Philip, and Prochorus, and Nicanor, and Timon, and Parmenas, and Nicolaus, a proselyte of Antioch. [6] These they set before the apostles, and they prayed and laid their hands on them.

Acts 6:1-6.

In this passage, a set of seven disciples ("commissioned ministers") are appointed to do certain tasks in order to free up the twelve apostles ("ordained ministers") to do other work. *See* Hermann Sasse, *The Lutheran Doctrine of the Office of the Ministry* (1943-44), *in* 2 *The Lonely Way: Selected Letters and Essays* (1941-1976), at 128 (2002) ("The *ministerium ecclestiasticum* may also be unburdened of peripheral tasks through the establishment of new offices. This happened already in the ancient church through the creation of the diaconate, or in more recent times by the creation of the office of church

counselor, church elder, or whatever else those who lead the congregation may be called.").

The Synod believes that only men are called by God to serve in the pastoral office, though both men and women can serve equally well as commissioned ministers.[3] Commissioned ministers can be either male or female and they serve in a range of positions within the Synod, but most typically as teachers in the church schools, deaconesses, ministers of music, and directors of Christian education. Both types of ministers are called positions; regardless of whether one is an ordained minister or a commissioned minister, a call is absolutely vital. *See, e.g.*, LCMS Commission on Theology, *The Ministry*, at 24 ("The call from and by God through the church is essential for entry into the pastoral ministry or its auxiliary of offices . . . All who serve in the pastoral ministry or its auxiliary offices must be called by the church.").

The path toward becoming a commissioned minister is a demanding one.[4] One must be a member of a Synod

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3. For a short explanation as to why the Synod believes women can properly serve as commissioned ministers, but not in the office of public ministry, see The Lutheran Church—Missouri Synod Commission on Theology and Church Relations, *The Ministry: Offices, Procedures and Nomenclature* 33 (1981) (hereinafter "LCMS Commission on Theology, *The Ministry*") (explaining that "[s]ince an auxiliary office is not the pastoral office, there is neither a Scriptural proscription against women holding the auxiliary office of teacher nor a Scriptural basis for considering women teachers inferior to men teachers."), *available at* www.lcms.org/Document.fdoc?src=lcm&id=423.

4. The following information and much more is provided in *Colloquy for Ministers of Religion-Commissioned in the*

congregation, have a bachelor's degree, and possess the professional and spiritual qualities expected of commissioned ministers. Potential candidates include those who are declared qualified by one of the Synod's ten colleges or universities upon graduation as well as those who apply to a Colloquy program at a Synod college or university, and if accepted, engage there in a course of theological study usually involving eight classes and an internship. In the latter case, a candidate must also successfully petition for an endorsement from the Synod district where he or she lives, submitting academic transcripts, letters of recommendation, an autobiographical personal statement, and written answers to various ministry-related questions. If studies are completed successfully and an endorsement is obtained from the relevant Synod district, the candidate must then pass a final oral examination, at which point he or she stands ready to receive a call.[5]

Lutheran Church-Missouri Synod, Policy Manual (2011), *available at* http://classic.lcms.org/graphics/assets/media/BHECUS/Colloquy%20Policy%20Manual%203_11.pdf and *LCMS Handbook*, § 3.8.3.5.1-3.8.3.5.5, at 144-46.

5. These processes too have an important historical dimension. The oral examination required of ordained and commissioned ministers goes back centuries. *See* The Lutheran Church—Missouri Synod Commission on Theology and Church Relations, *The Theology and Practice of "The Divine Call"* 32 (2003) (hereinafter "LCMS Commission on Theology, *The Divine Call*") ("In the sixteenth century [the] examination often took place over a period of several hours in front of a panel consisting of Luther, Bugenhagen, and Melanchthon."), *available at* http://www.lcms.org/Document.fdoc?src=lcm&id=410.

C. The Importance of Religious Education: Commissioned Ministers and Parochial Schools

Many commissioned ministers end up serving the church by working as parochial school teachers; indeed, the most common call received by commissioned ministers is to serve the church as such a teacher. The importance of religious education to the Synod cannot be overstated. The Synod maintains one of the largest private school systems in the country precisely because it sees the religious education of children as one of the most fundamental ministries of the church. Luther himself may have explained this point best:

> Above and elsewhere I have written much about the schools, urging firmness and diligence in caring for them. Although they may be viewed as something external and pagan, in as much as they instruct boys in languages and the arts, they are nevertheless extremely necessary. For if we fail to train pupils we will not have pastors and preachers very long—as we are finding out. The school must supply the church with persons who can be made apostles, evangelists, and prophets, that is, preachers, pastors, and rulers, in addition to other people needed throughout the world, such as chancellors, councilors, secretaries, and the like, men who can also lend a hand with the temporal government. In addition, if the schoolteacher is a godly man and teaches the boys to understand, to sing, and to practice God's word and the true faith and holds them to Christian discipline, then, as we said earlier, the schools are truly young and

> eternal councils, which perhaps do more good than many other great councils. . . .
>
> In summary, the schools must be second in importance only to the church, for in them young preachers and pastors are trained, and from them emerge those who replace the ones who die.

Martin Luther, *On the Councils and the Church* (1539), *in* 41 *Luther's Works, American Edition* 176 (1966).

Centuries later, in the middle of the 19th century, the Missouri Synod emerged as a budding Lutheran denomination in America. C.F.W. Walther was both the first President of the Synod and its most influential theologian. Seeing religious education as paramount to the future of the church, Walther stressed how individual congregations needed to develop strong parochial schools and strong parochial school teachers:

> In order that the Word of God may richly dwell in a congregation, the congregation should furthermore, if possible, establish an Ev. Lutheran school for children and for this purpose call in Christian order an orthodox, godly, and competent teacher, pledge him to adherence to the divine Word of the Old and the New Testament and the Confessions of the Lutheran Church, and place him under the supervision of the public ministry.

C.F.W. Walther, *Die rechte Gestalt einer vom Staate unabhaengigen Evangelisch-Lutherischen Ortsgemeinde* (*The Proper Form of an Evangelical Lutheran*

Congregation Independent of the State) (1863), *in Walther and the Church* 100 (Dallmann et. al. eds., English trans. 1938) (citations and quotations omitted). Walther explained that parochial school teachers serve in a role auxiliary to the pastor, but central to the church's purpose:

> Hence the highest office is that of the ministry of the Word, with which all other offices are also conferred at the same time. Every other public office in the church is part of the ministry of the Word or an auxiliary office that supports the ministry .... Therefore, the offices of Christian day school teachers, almoners, sextons, precentors at public worship, and others are all to be regarded as ecclesiastical and sacred, for they take over a part of the one ministry of the Word and support the pastoral office.

C.F.W. Walther, *Kirche und Amt* (*Church and Ministry*) 289-90 (1852) (English trans. 1987).

Since Walther's time, the Synod has placed great emphasis on the religious education of its children and on introducing the Gospel to other children whose parents choose a Lutheran education. Religious education is integrated into every part of school life.[6] The Synod's

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6. The Court used to give the label "pervasively sectarian" to religious institutions whose "secular activities cannot be separated from [religious] ones." *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 755 (1976). Though that term has fallen into disfavor, it indeed accurately describes the Synod's approach to education. *See, e.g., Helms v. Arveson*, No. 85-5533, 1994 WL 406406, at *7 (E.D. La. July 25, 1994) (enjoining public funds from going to various schools including a Synod school, Faith Lutheran, because of its pervasively sectarian nature), *rev. sub. nom. Mitchell v. Helms*, 530 U.S. 793 (2000).

Commission on Theology and Church Relations puts it this way:

> [T]he philosophy of Lutheran education includes the demand that the faith of the church be evident in all activities at the school. Law and Gospel, sin and grace are operative in the curriculum and methodology of a Lutheran school.

LCMS Commission on Theology, *The Ministry*, at 13.

In sum, the Missouri Synod firmly believes in the role of the schoolteacher as one who promotes the faith. While the schoolteacher's work differs in kind from that of a pastor, the two are similar in their importance to the church. Again, to quote Luther:

> [P]astors and schoolteachers are the lowly, but daily, permanent, eternal judges who anathematize without interruption, that is, fend off the devil and his raging. A council, being a great judge, must make old, great rascals pious or kill them, but it cannot produce any others. A pastor and a schoolteacher deal with small, young rascals and constantly train new people to become bishops and councils, whenever it is necessary. A council prunes the large limbs from the tree or extirpates evil trees. But a pastor and a schoolteacher plant and cultivate young trees and useful shrubs in the garden. Oh, they have a precious office and task, and they are the church's richest jewels; they preserve the church.

Martin Luther, *On the Councils and the Church* (1539), *in* 41 *Luther's Works, American Edition* 134-35 (1966).

D. The Mutual Obligations of Ministers and Congregations

Commissioned ministers, like ordained ministers, have unique and divinely ordered relationships of trust with their congregations. And the Synod believes deeply that, in those relationships, both ministers and congregations have important and unwaivable responsibilities to each other. Ministers have certain obligations to their congregations, to be sure. But congregations also have certain obligations to their ministers, including their called schoolteachers. Congregations must, for example, provide their called ministers with appropriate salaries. *See, e.g.*, C.F.W. Walther, *Die rechte Gestalt einer vom Staate unabhaengigen Evangelisch-Lutherischen Ortsgemeinde* (*The Proper Form of an Evangelical Lutheran Congregation Independent of the State*) (1863), *in Walther and the Church* 106 (Dallmann et. al. eds., English trans. 1938) (noting that it is "the duty of the congregation to provide according to its ability for the maintenance of the pastor that he may have food, clothing, and a dwelling for himself and his family" and that "[t]his applies also in due measure to the teachers of the young") (citations and quotations omitted).

Important here also is the fact that congregations are not to fire ministers arbitrarily. Indeed, within Lutheran theology, congregations do not fire ministers *at all*. Just as ministers are called by God rather than human beings, so too calls end when God dictates rather than when human beings dictate. Of course, human beings enter into the

process—they are to discern when God has deposed a minister, just as they are to discern when God calls a minister. But ultimately God is the decisionmaker on when a minister's call begins and when it ends. Perhaps Martin Chemnitz, an early Lutheran theologian, put it best:

> Just as God properly claims for Himself the right to call . . . so also has God properly reserved to Himself alone this power of removing someone from the ministry . . . . But as the procedure of a call is to follow the instruction of the Lord of the harvest, so also if one is to be removed from the ministry, the church must show that that also is done by the command and will of the Lord.

Martin Chemnitz, *Ministry, Word, and Sacraments: An Enchiridion* 37 (1593) (English trans. 1981). Centuries later, Walther put it similarly:

> A congregation has no right to depose such a faithful servant of Jesus Christ; if it does this, it rejects Jesus Christ himself . . . . A congregation can depose an incumbent of the holy ministry only if it is clear from the divine Word that God Himself has deposed him[.]

C.F.W. Walther, *Kirche und Amt* (*Church and Ministry*) 304 (1852) (English trans. 1987). *See also* LCMS Commission on Theology, *The Divine Call*, at 20 (pointing out that it would be utterly inconsistent with the divine nature of the office to treat "'the call of the preacher as nothing other than a contract of the kind made with a cow[-] or sow-herder'") (quoting C.F.W. Walther, *Americanisch-*

Lutherische Pastoraltheologie (*American Lutheran Pastoral Theology*) 427 (1906)).

With these principles firmly in mind, the Synod teaches that ministers can generally be fired only for certain narrow reasons—"1. Teaching false doctrine, 2. Offensive conduct or scandalous life, 3. Deliberate unfaithfulness in the performance of official duties, 4. Neglect of, or inability to perform, official duties, [or] 5. Domineering in office." LCMS Commission on Theology, *The Divine Call*, at 25. Called workers can therefore generally only be removed "on the basis of specific faults or failures on the part of the worker, not because a congregation would prefer no longer to have that called worker in their service." The Lutheran Church—Missouri Synod Commission on Theology and Church Relations, *Questions about the Removal of Called Workers from a Dispute Resolution Panel* 2 (2010) (hereinafter "LCMS Commission on Theology, *Removal of Called Workers*"), *available at* www.lcms.org/Document.fdoc?src=lcm&id=1051.[7] As a result,

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7. Somewhat relatedly, congregations may have to abolish positions outright for financial reasons. This is a somewhat different situation, but even so, congregations still have obligations to their called workers. *See* The Lutheran Church—Missouri Synod Commission on Theology and Church Relations, *Questions about the Removal of Called Workers from a Dispute Resolution Panel* 2 (2010) (hereinafter "LCMS Commission on Theology, *Removal of Called Workers*"), *available at* www.lcms.org/Document.fdoc?src=lcm&id=1051 (noting that "there are circumstances (such as financial distress) in which a congregation has no recourse but to abolish an office, including that of a called teacher," but even then "[c]ongregational responsibility for a called worker, however, would not immediately end with the decision to abolish an office" and would include "mak[ing] every effort to honor the provisions of the current call for pay and benefits while the teacher seeks another call").

"[a]lthough not pledged to remain in the teaching office for a lifetime, the normal expectancy of the church and of teacher candidates is that, unless prevented by personal circumstances, the teaching ministry of an individual will be followed as a lifelong calling." LCMS Commission on Theology, *The Ministry*, at 13.

As to the exact details of when ministers can be fired, there is some debate within the church.[8] But all agree that "the removal of a man from the office of the public ministry is a very serious matter and should not be carried out capriciously or arbitrarily." LCMS Commission on Theology, *The Divine Call* at 43. This is true for ordained ministers in the Synod (all of whom are male). But it is equally true for commissioned ministers. *See* LCMS Commission on Theology, *Removal of Called Workers*, at 2 (noting that "[w]hile these comments are directed toward the case of a pastor's removal, they also apply to other called workers, such as teachers").

Of course, one effect of these protections for ministers is that they become freer to preach the Word of God boldly to their potentially erring congregations, for Scripture has always warned of the temptation for ministers to dilute the Gospel to please their congregations and maintain their positions. *See, e.g.*, 2 *Timothy* 4:3-4 ("For the time is coming when people will not endure sound teaching . .

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8. The above list of reasons came from the Synod's Commission on Theology and Church Relations. One dissenter argued that the list was too expansive and "could easily invite abuse from those looking for an excuse to 'dump' their pastor." The Lutheran Church—Missouri Synod Commission on Theology and Church Relations, *Theology and Practice of "The Divine Call": A Minority Opinion* 15 (2003), *available at* www.lcms.org/Document.fdoc?src=lcm&id=1000.

. accumulat[ing] for themselves teachers to suit their own passions, and will turn away from listening to the truth and wander off into myths."). This is part therefore of the Synod's powerful interest in protecting a righteous minister from improper treatment by a congregation, because the Synod believes, at bottom, that a called minister is "'the one by whom God desires to make known to [the congregation] His will and lead it to eternal life.'" LCMS Commission on Theology, *The Divine Call*, at 21 (quoting C.F.W. Walther, *Kirche und Amt* (*Church and Ministry*) 304 (1852) (English trans. 1987)).

II. Dispute-Resolution Procedures in the Lutheran Church

We next trace the historical and theological basis for the church's internal dispute-resolution system and the details of the Synod's dispute-resolution practice.

A. The Theology and History of Church Dispute Resolution

St. Paul teaches in his first letter to the Corinthians that Christians should generally resolve their disputes internally without going to the secular courts for relief:

> [1] When one of you has a grievance against another, does he dare go to law before the unrighteous instead of the saints? [2] Or do you not know that the saints will judge the world? And if the world is to be judged by you, are you incompetent to try trivial cases? [3] Do you not know that we are to judge angels? How much more, then, matters pertaining to this

> life! [4] So if you have such cases, why do you lay them before those who have no standing in the church? [5] I say this to your shame. Can it be that there is no one among you wise enough to settle a dispute between the brothers, [6] but brother goes to law against brother, and that before unbelievers? [7] To have lawsuits at all with one another is already a defeat for you. Why not rather suffer wrong? Why not rather be defrauded? [8] But you yourselves wrong and defraud—even your own brothers!

1 *Corinthians* 6:1-8.

The Synod has emphasized the importance of this biblical teaching: "[A]llowing the world to judge Christians and to settle their differences would be to dishonor God, who has given them this glorious position." The Lutheran Church—Missouri Synod Commission on Theology and Church Relations, *1 Corinthians 6:1-11: An Exegetical Study* 9 (1991) (hereinafter "LCMS Commission on Theology, *An Exegetical Study of Corinthians*"), *available at* www.lcms.org/Document.fdoc?src=lcm&id=415. The early Christian Church was also firmly committed to this view—consider, for example, the Council of Chalcedon's statement in the middle of the fifth century:

> If any cleric has a case to bring against a cleric, let him not leave his own bishop and take himself off to the secular courts, but let him first air the problem before his own bishop . . . . If anyone acts in a contrary fashion, let him be subject to canonical penalties. If a cleric has a case to bring either against his own or against

> another bishop, let him bring the case to the synod of the province . . . .

The Council of Chalcedon, Canon IX (451).

These Scriptural demands, along with the authoritative church interpretations of them, are not merely good advice that the Synod is free to ignore. The Synod believes that Christians simply must resolve certain disputes within the church. Those who disobey that text disobey God, and the church that tolerates such disobedience also disobeys God. *See* LCMS Commission on Theology, ***An Exegetical Study of Corinthians***, at 17 ("The church which fails to discipline its members when they go to court against fellow members in a way which violates the intent of the Word of God and fails to act to correct and eliminate that practice is abdicating its responsibility.").

B. The Synod's Dispute-Resolution Process

Flowing from its theological commitments, the Synod has over the years developed an intricate set of detailed procedures for the resolution of controversies within the church. Found in the Synod's governing handbook, these procedures span 14 pages and are worthy of in-depth review. *See Handbook of the Lutheran Church—Missouri Synod* § 1.10.1-1.10.18, at 36-49 (2004) (hereinafter "*LCMS Handbook*"), *available at* www.lcms.org/Document.fdoc?src=lcm&id=926; Pet. App. at 75a-104a.[9]

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9. This brief generally refers to the dispute-resolution procedures established by the 2004 Handbook, as that was the document in effect when the instant controversy arose. It is, however, generally consistent with later versions of the Handbook as well. *See Handbook of the Lutheran Church—Missouri Synod* (2010), *available at* ww.lcms.org/Document.fdoc?src=lcm&id=928.

To begin, it is important to clarify the sorts of disputes that fall within the bounds of the Synod's dispute-resolution process. Two important limitations must be addressed at the outset. First, the Synod's process only applies to disputes between certain parties—principally the Synod itself, member congregations, ordained and commissioned ministers, and lay people holding certain important positions within the Synod. The Synod's process does not apply to congregants generally or to lay teachers. *Id.* § 1.10.2 (Pet. App. 79a-80a) (explaining that the Synod's procedures only apply to disputes between Synod members); *id.* ART. V (*LCMS Handbook*, at 12) (defining members to include called ministers and certain persons in certain Synod positions). Second, the Synod's process does not apply to certain types of issues. Disputes over property or contractual rights are considered purely temporal matters falling outside of the Synod's purview, "unless such matters involve theological, doctrinal, or ecclesiastical issues, including those arising under the divine call of a member of the Synod." *Id.* § 1.10.3 (Pet. App. 80a). Of course, neither of these two limitations would apply in this case, given that respondent was a commissioned minister bound to the Synod's dispute-resolution process and the dispute here specifically did involve a theological issue—the revocation of her divine call. For this type of dispute—and for all disputes such as this one that fall within the scope of the Synod's dispute-resolution process—the Synod's Constitution declares that its internal process "shall be the exclusive remedy to resolve such disputes." *Id.* § 1.10.2 (Pet. App. 79a); *see also id.* § 1.10.1.1 (Pet. App. 77a) ("The use of the Synod's conflict resolution procedures shall be the exclusive and final remedy for those who are in dispute. Fitness for ministry and other theological matters must be determined within the church.").

The Synod's dispute-resolution procedure is modeled on the 18th chapter of the book of Matthew. The Gospel prescribes a reconciliation process whereby disputants are encouraged to resolve their differences through a series of meetings of escalating formality and increasing numbers of mediating church personnel:

> 15 "If your brother sins against you, go and tell
> him his fault, between you and him alone. If he
> listens to you, you have gained your brother.
> 16 But if he does not listen, take one or two
> others along with you, that every charge may
> be established by the evidence of two or three
> witnesses. 17 If he refuses to listen to them, tell
> it to the church. And if he refuses to listen even
> to the church, let him be to you as a Gentile and
> a tax collector. 18 Truly, I say to you, whatever
> you bind on earth shall be bound in heaven, and
> whatever you loose on earth shall be loosed in
> heaven. 19 Again I say to you, if two of you agree
> on earth about anything they ask, it will be done
> for them by my Father in heaven. 20 For where
> two or three are gathered in my name, there
> am I among them."

Matthew 18:15-20.

In accordance with these Biblical principles, the first step in the Synod's process is one of informal reconciliation, where the parties meet face to face on their own, with or without an assisting intermediary known as a reconciler. *Id.* § 1.10.5 (Pet. App. 84a-85a). If that fails, the second step is that of formal reconciliation, where one party files a written complaint and the other files a written response.

The parties then meet officially with a reconciler (and perhaps key witnesses), with the reconciler ultimately filing a written but confidential report explaining the controversy, the issues that have been resolved, and the issues that remain unresolved. *Id.* § 1.10.6-1.10.6.5 (Pet. App. 85a-87a).

If that second step fails to resolve the problem, the parties move into the more formal dispute-resolution process, where a panel of three reconcilers decides the issues at a formal hearing. *Id.* § 1.10.7-1.10.7.4 (Pet. App. 87a-90a). After the panel decision is rendered, each party has the right to ask for an appeal from the Appeal Panel, and if an appeal is granted, a Review Panel will decide the issues on the record without further formal hearing. *Id.* § 1.10.8-1.10.8.5 (Pet. App. 90a-91a). At that point, the decisions are binding on the parties and not subject to further appeal. *Id.* § 1.10.8.5(a) (Pet. App. 91a).

In all these processes, the Synod concerns itself deeply with procedural justice. Synod rules provide for limited discovery and compulsory process of witnesses, *id.* § 1.10.18.1 (Pet. App. 100a), forbid *ex parte* contacts, *id.* § 1.10.18.1 (Pet. App. 100a-101a), protect the right to counsel, *id.* § 1.10.18.1 (Pet. App. 101a), establish the right to present evidence, *id.* § 1.10.7.4(a) (Pet. App. 88a-89a), create an appeal process, *id.* § 1.10.8-1.10.8.5 (Pet. App. 90a-91a), and authorize certification of theological issues to the Synod's Commission on Theology and Church Relations, *id.* § 1.10.18.1 (Pet. App. 102a-103a).

This is not to suggest that Synod procedure mimics the Federal Rules. The Synod aims for spiritual reconciliation rather than any purely legal judgment, so its rules differ

from those of the federal courts in understandable ways. While the Constitution requires public trials, *see Presley v. Georgia*, 130 S. Ct. 721 (2010), the Synod keeps its proceedings confidential, *id.* § 1.10.18.1 (Pet. App. 101a). While both the Constitution and the Synod allow attorneys to be present, the Synod does not allow anyone but the parties and witnesses to speak—a non-adversarial model where parties present their own views, the Synod believes, is the one consistent with Scripture and best for finding common ground. *Id.* § 1.10.7.4(a) (Pet. App. 88a-89a).

Indeed, the Synod's focus on reconciliation can perhaps be seen most clearly in its personnel who assist with the dispute-resolution process, who are called "reconcilers" rather than judges. Four reconcilers, no more than two of whom are pastors, are chosen out of each of the thirty-five Synod districts nationwide. Their terms are six years apiece; their main qualification for the position is that they are "people 'of good reputation, full of the Holy Spirit and Wisdom.'" *Id.* § 1.10.10.1 (Pet. App. 92a) (quoting *Acts* 6:3). But the Synod gives them significant training in helping to reunite disputing parties. And the Synod also takes care to ensure that reconcilers are chosen neutrally for each individual dispute. Synod procedures require that, for each case in which a panel of reconcilers is required, nine names are randomly chosen from the long list of reconcilers. *Id.* § 1.10.13.1(a) (Pet. App. 95a). Each party can then challenge reconcilers for cause. *Id.* § 1.10.16 (Pet. App. 99a). Each party even has three peremptory strikes. *Id.* § 1.10.13.1(c) (Pet. App. 95a); *cf. Rivera v. Illinois*, 129 S. Ct. 1446, 1453 (2009) (noting the "ancient lineage of the peremptory challenge [which] has long been lauded as a means to guard against latent bias").[10]

10. Additional rules govern what to do if so many of the nine reconcilers are struck that they are insufficient to make up

C. The Dispute-Resolution Process and Commissioned Ministers

Any called minister who has disputes with his or her congregation can bring a claim under these dispute-resolution procedures. As explained before, in part because called ministers must be free to criticize erring congregations, called ministers can only be removed for quite limited reasons. *See* LCMS Commission on Theology, *The Divine Call*, at 25 (explaining those reasons, such as "teaching false doctrine, offensive conduct or scandalous life, deliberate unfaithfulness in the performance of official duties, neglect of, or inability to perform, official duties, or domineering in office").

Each year reconcilers and dispute-resolution panels work to resolve controversies between commissioned ministers who teach in the parochial schools and their congregations—many of which involve the termination of a call—utilizing these dispute-resolution procedures. *See* LCMS Commission on Theology, *Removal of Called Workers*, at 1-2. While panels of reconcilers strenuously work to bring the parties to some mutually agreeable resolution, they also have the power to issue remedies. Panels can order congregations to reconsider their actions; they can order back pay and other forms of compensation. Although the Synod's process usually relies on informal pressure on its congregations to ensure compliance with panel decisions, there is always the possibility of harsher sanctions—the harshest sanction being the outright expulsion of a congregation from the Synod itself. And this sanction has historically been used: Wayward

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a three-reconciler panel. *LCMS Handbook* § 1.10.13.1 (Pet. App. 95a) (explaining how additional names will be drawn blindly with each party having additional peremptory challenges).

congregations have indeed been expelled from the Synod for failure to honor decisions of the dispute-resolution process, some relating to how congregations have treated their ministers.

In sum, Synod congregations do not arbitrate their disputes with ministers. Disputes are handled through the Synod's dispute-resolution process, which involves neutrally selected reconcilers, strong procedural protections for ministers, and a powerful substantive decree that a minister's call is not to be terminated except in rare and specifically delineated circumstances. Again all this reflects how the Synod has a strong interest in protecting ministers from improper actions by their congregations so that they can be free to preach the Gospel more boldly.

*****

The Synod has strongly held religious beliefs about commissioned ministers, their role in the church, and the way in which disputes between them and their congregations should be resolved. These views go back centuries and are evident in the biblical text, the works of early Reformation leaders, the writings of 19th century Missouri Synod theologians, and the more recent publications of the church. But the real origin of all of these views, the Synod believes, is God. The Synod's doctrines, rules, and procedures are what they are because the Synod believes, at bottom, that this is what God desires for the church.

Taking respondent's position in this case would prevent the Synod from following what it believes to be

the will of God. The Synod believes, for example, that God calls commissioned ministers and that God deposes them; respondent's attempt to reinstate her own call therefore goes directly against God's will. The Synod believes that God wants commissioned ministers to raise their disputes within the church; respondent's decision to bring the state in against the church therefore also goes directly against God's plan. These views are not widely shared. They are not even widely understood. But they have been the views of orthodox Lutherans for centuries.

The Sixth Circuit's approach to this case showed manifest disregard to these well-established beliefs. The Court dismissed the office of commissioned minister as an irrelevant "title" (Pet. App. 22a)—contrary to centuries of church teaching. It opened the door for the government to impose a commissioned minister on the church—even when the church believes that the minister had violated church teaching and had been deposed by God. And it held that the church's actions could be treated as illegal retaliation—even when the church is merely adhering to centuries of Lutheran teaching obligating ministers to resolve their disputes within the church.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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AMICUS CURIAE BRIEF

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AND
BRIEFS

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No. 10-553

In The Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND SEVEN OTHER STATES

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QUESTION PRESENTED

Whether the ministerial exception should apply to an employee of a religious institution who performs religious functions, or whose claim would entangle the government in religious questions.

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INTEREST OF *AMICI CURIAE*[1]

The *amici* states become entangled in employment disputes among religious institutions and their employees in two distinct ways: (1) the investigation of employment-discrimination complaints lodged with a state department of civil rights, and (2) the administration and disposition of employment-discrimination lawsuits in a state civil-court system. The *amici* states have no particular interest in how employment disputes between religious organizations and their employees are resolved on the merits, including resolution of the employment action that is the subject of this very case. But the states have a significant interest in this Court's articulation of a clear and expansive standard for determining when the so-called "ministerial exception" applies. Such a standard will avoid unnecessary state entanglement in religious affairs, including potential entanglement in determining whether a particular religious employee is subject to state investigation or judicial review in the first instance.

The *amici* states respectfully request that the Court define the ministerial exception to extend to a religious-institution employee (1) who performs any religious function, or (2) whose claims would entangle the courts in religious questions.

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[1] No person or entity other than the *amici* made a monetary contribution to this brief's preparation or submission. No counsel for a party authored this brief in whole or in part or made a monetary contribution for its preparation or submission.

SUMMARY OF ARGUMENT

The "ministerial exception" to employment-law litigation is intended to avoid state entanglement with the employment relationship between a religious organization and its religious employees. The question presented in this case, as framed by Petitioner, is "where to draw the line." (Pet'r Br. at 2.) The location of that line is of crucial importance to the *amici* states, whose courts and civil-rights departments are the most likely sources of the entanglement the ministerial exception seeks to avoid. For three reasons, the *amici* states respectfully request that the Court reject the primary-duties test adopted and applied by the Sixth Circuit below.

First, as demonstrated by the facts of this case, the primary-duties test is concerned more with the quantity of time an employee spends on particular duties, rather than on the qualitative nature of those duties. Accordingly, the test will sometimes classify an employee as non-ministerial despite substantial religious functions. Here, for example, Ms. Perich taught religion classes, led worship and prayer, served as a Christian role model, integrated religion into secular subjects, and occupied ecclesiastical office (Pet'r Br. 37–50), yet the Sixth Circuit still concluded that her "primary duties" were secular.

Second, allowing Perich's lawsuit to proceed will require the courts to decide multiple religious questions (Perich's fitness for ministry, the appropriate process for resolving Church-employee disputes, the relative importance to give the Church's teachings against civil litigation, etc.). And that is precisely the

sort of entanglement the ministerial exception is supposed to avoid.

Third, to assess a religious employee's "primary duties," courts must necessarily characterize those duties as sacred or secular, then weigh the relative importance of those duties against one another. E.g., *EEOC* v. *Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 779–80 (6th Cir. 2010) (characterizing Perich's teaching duties as secular and weighing them as more "primary" than her religious duties, notwithstanding her charge to incorporate religion when teaching all secular subjects). And when a state court or civil-rights department is forced to engage in such characterization and weighing, the analysis itself has the risk of unlawful entanglement.

Such religious entanglement is particularly problematic for states, because it cannot be cured by state legislation. Neither state agencies (due to federal funding) nor state courts (due to their duty to adjudicate federal claims) have the ability to ignore or alter *federal* employment mandates.

For all these reasons, the *amici* states respectfully submit that a sound approach would define the ministerial exception broadly to extend to a religious-institution employee (1) who performs any religious function, or (2) whose claims would entangle the courts in religious questions. This is a workable, objective test, one that will ensure minimum friction between state courts and civil-rights departments on the one hand, and religious institutions and their employees, on the other.

ARGUMENT

I. State agencies and courts should not be in the business of resolving quintessentially religious controversies.

For more than a century, this Court's jurisprudence has wisely steered federal and state courts away from religious disputes. Beginning 140 years ago, in *Watson* v. *Jones*, 80 U.S. 679 (1871), the Court was asked to resolve a dispute between two distinct bodies of the Presbyterian Church regarding ownership of Church property. Declaring that "the civil courts exercise no jurisdiction" over "a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them," *id.* at 733, this Court emphasized that religious disputes should be resolved in religious tribunals, not the courts:

> *The right* to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and *to create tribunals for the decisions of controverted questions of faith within the association . . . is unquestioned. . . . But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.*

Id. at 729 (emphasis added).

Many decades later, this Court applied the same principles to a Church employment action. In *Gonzalez* v. *Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929), plaintiff Gonzalez believed that he had a legal right to fulfill a chaplain vacancy in the Roman Catholic Archdiocese of Manila, Philippines. But the Catholic Church concluded that Gonzales was not qualified for the position under Church law. This Court respectfully declined Gonzalez's request that the Court intervene in the Catholic Church's internal affairs:

> Because the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them. In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.

Id. at 16 (emphasis added). Accord, e.g., *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 113 (1952) (holding, in a non-employment context, that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.") (citation omitted).

In 1979, in *Jones* v. *Wolf*, 443 U.S. 595 (1979), this Court clarified that a religious organization can take affirmative steps to avoid entanglement with civil authorities by specifying where and how religious disputes should be resolved:

> [R]eligious societies can specify . . . what religious body will determine the ownership [of church property] in the event of a schism or doctrinal controversy. In this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members.

Id. at 603–04.

In the case at hand, the Lutheran Church-Missouri Synod properly created a standard religious procedure of internal dispute resolution for Church personnel altercations, which would allow members of Hosanna-Tabor to decide the doctrinal controversy regarding Perich's employment. Ultimately, it was the members of the Church who resolved the dispute by voting to terminate Perich's contract. This internal procedure, which Perich ignored, cannot be overruled by civil adjudication, because it would be impossible for a civil court to avoid ecclesiastical issues. As an educated, ordained, and instructive "minister" of Hosanna-Tabor, Perich's employment was intimately intertwined with religious doctrine. State courts and administrative agencies are not in a position to second-guess the wisdom or propriety of a Church's religious precepts and practices.

II. The Court should adopt an expansive and straightforward test for lower courts and state agencies to apply when determining if a religious employee falls within the ministerial exception.

The *amici* states desire parameters for the ministerial exception that do not require state courts and agencies to second-guess a religious organization's reasons for taking an employment action with respect to an employee who performs any religious function, or to resolve claims that necessarily require the resolution of religious questions. The primary-duties test that the Sixth Circuit adopted below does not satisfy these criteria. First, the primary-duties test forces the courts or state agencies to make difficult and often controversial determinations about a particular job function's secular or religious nature. Second, the test forces the courts or agencies to weigh the relative importance of the secular duties against the religious duties. That places the courts and agencies in an untenable position, one that is in conflict with the religion clauses of the federal and state constitutions.

The test propounded by Petitioner—whether a religious-organization employee performed religious functions that were important to the mission of the Church (Pet'r Br. at 37–50)—is much better, in that it asks whether a particular religious function was important to the Church. This approach is likely easier and less controversial than one which requires determinations about myriad job functions and artificial comparisons of the time spent on each—as if one minute grading math papers is worth one minute of religious or moral instruction, for example. In other

words, it avoids the requirement of weighing the relative importance of an employee's secular and religious tasks. The issue whether the religious function is important as a threshold question does not require a comparison of that function to a secular task, alleviating the duty to determine the comparative value of one against the other.

But the best ministerial-exception test for the *amici* states would direct the courts and state agencies to shy away from religious inquiry altogether, applying the exception categorically to a religious-institution employee (1) who performs any religious function, or (2) whose claims would entangle the courts in religious questions. Such a test would protect from state inquiry a decision to hire only celibate clergy, for example, while allowing the state to intervene if a religious institution discriminates against a janitor or groundskeeper based on ethnicity or disability.

Equally important, the *amici* states' broad test would not place the state in the position of having to decide whether a particular job function is primarily religious or secular, or to determine the weight to assign a religious function in the overall mission of the religious organization.[2]

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[2] As Petitioner notes, "under the dominant understanding of the ministerial exception in the courts of appeals, the court need not even identify the church's religious beliefs, let alone balance them." (Pet'r Br. at 25 (citing *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 304 n.7 (3d Cir. 2006); *Starkman* v. *Evans*, 198 F.3d 173, 176 (5th Cir. 1999); *Young* v. *Northern Ill. Conf.*, 21 F.3d 184, 186 (7th Cir. 1994); *Scharon* v. *St. Luke's Episcopal Presbyterian Hosps.*, 929 F.3d 360, 363 (8th Cir. 1991); and *EEOC* v. *Catholic University*, 83 F.3d 455, 465 (D.C. Cir. 1996)).

In contrast, the Sixth Circuit's primary-duties test invites second-guessing by the courts of the Church's own assessment of the employee's role, as evidenced here when the Sixth Circuit determined that a commissioned minister who led children in devotional practices and led chapel services did not fall within the ministerial exception.

Consider, for example, a Jewish day school that requires its history teachers to explain the history of Israel, ancient and modern, from a Jewish perspective.[3] The school fires a teacher who refuses to discuss Israel in history class, and he files suit, alleging gender discrimination in employment. A court using a primary-duties test might conclude that the ministerial exception does not apply, because in the course of an academic school year, the teacher is required to spend very little time discussing the history of Israel. Yet this is precisely the type of entanglement that state courts and agencies should avoid—analyzing the importance of Israeli history to a Jewish organization relative to the teacher's secular teaching duties. See *Employment Division* v. *Smith*, 494 U.S. 872, 877 (1990) ("The government may not . . . lend its power to one or the other side in controversies over religious authority or dogma.") (citations omitted). States should not be involved in analyzing religious doctrine. See, e.g., *Starkman* v. *Evans*, 198 F.3d 173, 176 (5th Cir. 1999) (when considering whether to apply the ministerial

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[3] As Petitioner notes, this Court has vigilantly protected against entanglement with teachers in religious schools. (Pet'r Br. at 31 (citing *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979), and *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971)). "Perich's claim—involving a commissioned minister who teaches religion—presents an even greater risk of entanglement." (*Id.*)

exception, the "most important" factor is whether the employee "engaged in activities traditionally considered ecclesiastical or religious," including "whether the plaintiff 'attends to the religious needs of the faithful.'") (citation and quotation omitted).

The present dispute is a paradigm example of the type of entanglement that the *amici* states seek to avoid by the crafting of a clear, expansive test for the ministerial exception. Hosanna-Tabor argues that its decision to fire Perich is premised on, among other things, her disruptive behavior and refusal to follow Church doctrine favoring internal dispute resolution. For her part, Perich claims that her termination was motivated by retaliation. The government should not be involved in the business of choosing Church leadership, nor should it dictate who is performing religious functions within a Church.

State courts and agencies should similarly abstain when asked to resolve a claim that would involve resolution of a purely religious question. Consider, for example, *Minker* v. *Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990). The plaintiff there, a United Methodist minister, claimed that the Church's Book of Discipline created a binding contract between him and the United Methodist Church, barring the Church from choosing ministerial appointments based on age. *Id.* at 1358–59. Holding that the interpretation of the Book of Discipline was an "inherently ecclesiastical matter," the court explained that "[t]he scope of the Church's purported duty to not discriminate in its ministerial appointments will inevitably require interpretation of provisions in the [Book of] Discipline that are highly subjective,

spiritual, and ecclesiastical in nature." *Id.* at 1359. "We cannot imagine an area of inquiry less suited to a temporal court for decision; evaluation of the 'gifts and graces' of a minister must be left to ecclesiastical institutions." *Id.* at 1357.

Church employment decisions can likewise involve an impermissible interpretation of Church doctrine. Take a married math teacher at a religious school who inarguably has no formal or informal religious function. It should still be within the school's purview to fire the teacher if he uses Twitter to text lewd photos of himself to young women that he meets over the Internet, contrary to Church teachings about marriage. Allowing the worker to file a claim with a state agency or in a state court would again place a state entity in the untenable position of having to determine the importance and authenticity of the Church's belief.

In sum, it is not enough to avoid religious entanglement for this Court to simply exempt employment claims filed by employees performing a religious function; the Court must also exempt claims that would require a state agency or court to analyze the validity of any religious questions.

CONCLUSION

The Court should define the ministerial exception to extend to any religious-institution employee (1) who performs any religious function, or (2) whose claims would entangle the courts in religious questions.

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICI CURIAE* MUSLIM-AMERICAN PUBLIC AFFAIRS COUNCIL, UNITED SIKHS, CHURCH OF THE LUKUMI BABALU AYE, INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, O CENTRO BENEFICENTE UNIAO DO VEGETAL, AND TEMPLO YORUBA OMO ORISHA IN SUPPORT OF PETITIONER AND SUGGESTING REVERSAL

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INTEREST OF *AMICI CURIAE*[1]

Amici are religious organizations or representatives of religious organizations that have minority status in the United States. O Centro Beneficente Uniao do Vegetal is a Christian Spiritist religion with origins in Brazil. The Church of the Lukumi Babalu Aye follows the Lukumi religion known as Cuban Santeria. International Society for Krishna Consciousness is a monotheistic faith within the Hindu tradition. Templo Yoruba Omo Orisha draws its roots from the Yoruba religion brought to the Caribbean and the Americas by slaves from West Africa. UNITED SIKHS is an UN-affiliated NGO whose mission is to protect disadvantaged communities through international civil and human rights advocacy, humanitarian aid, and health and education initiatives geared towards the Sikh community. And the Muslim-American Public Affairs Council is a public service organization representing the civil rights of American Muslims. These organizations represent a wide array of religious beliefs, practices, and organizational structures. Each believes that a robust ministerial exception is essential to preserving the autonomy of all religious organizations – including their own and those they represent – to designate who will carry out

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[1] No counsel for a party authored this brief in whole or in part. No person other than the *amicus curiae* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for all parties have consented to its filing. The letters of consent are on file with the Clerk.

their religious missions, to organize their own affairs, and to define the scope of their beliefs. They emphasize the heightened risk that they and other minority religions face under the ministerial exception as construed by the Sixth Circuit Court of Appeals and urge this Court to adopt instead a deferential standard consistent with the Court's long-standing precedents that protect the autonomy of all religious organizations.

SUMMARY OF ARGUMENT

The Sixth Circuit Court of Appeals' application of the "ministerial exception" in this matter encroaches significantly on the First Amendment's guarantees of religious freedom for religious organizations. It impairs their exclusive prerogative under the Free Exercise Clause to designate who will carry out their religious functions. And it breaches the barrier created by the Establishment Clause against excessive entanglement by the state in their affairs. These harms are amplified for minority religious organizations, like *amici* here, whose religious practices are often deemed atypical and frequently misunderstood. Judicial efforts to weigh religious organizations' specific activities on the scale from secular to sacred are questionable in any instance, but leave minority religious organizations particularly susceptible to infringement of their rights. A robust ministerial exception that gives meaningful deference to the good-faith identification by religious organizations of their

sacred functions – and by extension the employment positions responsible for carrying them out – is necessary to protect the First Amendment rights of all religious organizations, and minority religious organizations in particular. Such protection extends naturally from this Court's long-standing precedents giving religious organizations broad autonomy to govern their own affairs. The Sixth Circuit's departure from these precedents should accordingly be reversed.

ARGUMENT

I. This Court's precedents invoke a "spirit of freedom" for religious organizations in how and through whom they promote their doctrines.

This Court has long recognized the "full, entire, and practical freedom for all forms of religious belief and practice which lies at the foundation of our political principles." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1871). The Court in *Watson* emphasized that "[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Id.* Instead, the right of all persons "to organize voluntary religious associations" that disseminate doctrine, resolve "controverted questions of faith," and establish "ecclesiastical government" over their "members, congregations, and

officers" is "unquestioned." *Id.* at 728-29. Giving substance to these principles, the Court in *Watson* held that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law" have been resolved by a religious organization's internal system of governance, "the legal tribunals must accept such decisions as final, and as binding on them." *Id.* at 727. Individual members aggrieved by the organization's decisions have available to them only "such appeals as the organism itself provides for." *Id.* at 729. In other words, "[a]ll who unite themselves to such a body do so with an implied consent to this government." *Id.*

This deference to the institutional governance of religious organizations was based, at least in part, on recognition of the civil courts' own limitations. "It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law ***and religious faith***" of religious organizations as "the ablest men in each are in reference to their own." *Id.* (emphasis added). Indeed, the Court warned that "civil courts" supervising matters of "faith, discipline, and doctrine" would "only involve themselves in a sea of uncertainty and doubt which would do anything but improve either religion or good morals." *Id.* at 732.

The Court has consistently reasserted these principles in a variety of contexts, including in disputes concerning the appointment of clergy. In *Gonzalez v. Roman Catholic Archbishop of Manila*, the Court rejected the petitioner's claim that he was "legally

entitled to be appointed the chaplain." 280 U.S. 1, 10 (1929). The Court reasoned that "appointment is a canonical act." *Id.* at 16. Thus, "it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them." *Id.* Such decisions are binding, despite potentially "affecting civil rights." *Id.*

In *Kedroff v. St. Nicholas Cathedral*, the Court struck down a law transferring "control of the New York churches . . . from the central governing hierarchy of the Russian Orthodox Church [in Moscow] to the governing authorities of the Russian Church in America." 344 U.S. 94, 107 (1952). The Court deemed the dispute "a matter of ecclesiastical government" and upheld the power of the mother church in Russia "to appoint the ruling hierarch of the archdiocese of North America." *Id.* at 115. In making this ruling, the Court cited *Watson* at length, expressly rooting it in the First Amendment's Free Exercise clause:

> [*Watson*] radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Freedom to select the clergy . . . must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.

Id. at 116.

Nearly twenty-five years later, in *Serbian Eastern Orthodox Diocese v. Milivojevich*, the Court reconfirmed this deference to religious organizations in selecting their leaders. The Supreme Court of Illinois had reinstated a diocesan bishop defrocked by the highest authorities of the Serbian Orthodox church. The bishop prevailed on the ground that the church had acted arbitrarily by "not follow[ing] its own laws and procedures" in removing him. 426 U.S. 696, 712-13 (1976). This Court rejected the Illinois court's analysis to hold that there is "no 'arbitrariness' exception" in determining whether "the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations." *Id.* at 713. The civil courts are barred from questioning the ecclesiastical jurisdiction of religious organizations in governing their affairs. *Id.* at 714. If civil courts were "to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care." *Id.* Such "detailed review" is "impermissible" under the First Amendment. *See id.* at 718.

The Court reaffirmed this line of cases in its landmark decision in *Employment Division v. Smith*, 494 U.S. 872, 877 (1990) (government cannot "lend its power to one or the other side in controversies over religious . . . dogma"). They reflect this Court's

longstanding optimism drawn from the core of the First Amendment that deference to religious organizations in arranging their own affairs ultimately promotes rather than hinders the values that sustain a sound and stable society.

II. The Sixth Circuit's ruling hinders religious organizations' right to select who will promote their faith by empowering courts to decide when some means of promotion are too secular.

The Sixth Circuit's ruling defies the autonomy that this Court's precedents have long extended to religious organizations. Specifically, it rejects the right of religious organizations to select their own leaders, spokespersons, or other faith promoters unless those individuals spend more than fifty percent of their time engaged in activities that ***the court*** agrees are "religious." Here, for example, respondent Cheryl Perich undisputedly performed religious functions for petitioner Hosanna-Tabor Lutheran Evangelical Church and School. Perich was formally "called" into religious service at the church school and given the title of "commissioned minister." Pet. App. 3a-4a. She initiated religious devotionals by her students each morning, taught them religion for thirty minutes four times a week, led them in prayer three times a day, and accompanied them weekly to chapel. Pet. App. 4a. The Church plainly attributed religious significance to these functions. It promoted the school as providing "a 'Christ-centered education'

that helps parents by 'reinforcing bible principals [sic] and standards'" and described its teachers as "fine Christian role models who integrate faith into all subjects." Pet. App. 4a-5a. It was never disputed that these characterizations of its religious mission were sincere.

The Sixth Circuit, however, rejected the Church's genuine attachment of religious significance to Perich's employment, because – in counting her hours – it noted that she spent only forty-five minutes a day engaged in what it deemed religious conduct, while spending the remaining six hours and fifteen minutes teaching ostensibly secular subjects. Pet. App. 4a, 20a. On this mathematical foundation, the Sixth Circuit concluded that the Church lacked autonomy to dismiss Perich free from government scrutiny. "The fact that Perich participated in and led some religious activities through the day does not make her ***primary*** function religious." Pet. App. 20a. (emphasis added). Thus, the Church's Free Exercise right to "select [its] clergy," *Kedroff*, 344 U.S. at 116, was restricted where the Church failed to utilize that clergy in a role that ***the court*** deemed sufficiently religious. The Church's own assessment that it could best convey the faith to the next generation through ministers called to teach in its church school was given no deference, even though this Court has acknowledged the purely religious nature of such a calling. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979) (recognizing the "critical and unique role of the teacher in fulfilling the mission of a

church-operated school"); *Lemon v. Kurtzman*, 403 U.S. 602, 628 (1971) (Douglas, J., concurring) (noting "the admitted and obvious fact that the *raison d'être* of parochial schools is the propagation of a religious faith").

In parsing by the hour the religious nature of Perich's labors, the Sixth Circuit also violated the Establishment Clause. It adopted Perich's definition of what functions carried out by the Church could be considered "religious," despite the Church's competing view. *See EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 465 (D.C. Cir. 1996) (noting that "courts have found an unconstitutional entanglement . . . where the Government is placed in a position of choosing among 'competing religious visions'") (citations omitted). In the process, it implicitly condoned subjecting the Church to litigation discovery, a costly and time consuming process "designed to probe the mind of the church in the selection of its ministers." *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985); *see also NLRB*, 440 U.S. at 502 ("It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions."). Thus, in every respect, the Sixth Circuit's ruling contravenes this Court's precedents affording deference and autonomy to religious organizations in selecting who will carry out their religious aims.

III. The religious freedoms of minority religious organizations are particularly susceptible to encroachment under the Sixth Circuit's approach.

The complications inherent in civil courts' efforts to distinguish between the sacred and secular activities of religious organizations are enhanced with respect to minority religions whose beliefs and rituals are poorly understood. *See Spencer v. World Vision, Inc.*, 633 F.3d 723, 732 n.8 (9th Cir. 2011) (O'Scannlain, J., concurring) (noting that questions about what constitutes religious activity "might prove more difficult when dealing with religions whose practices do not fit nicely into traditional categories"). The case law reveals this negative potential. In *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, for example, the Fourth Circuit Court of Appeals considered whether a Jewish mashgiach – "an inspector appointed by a board of Orthodox rabbis to guard against any violation of the Jewish dietary laws" – qualified for the ministerial exception. 363 F.3d 299, 301 (4th Cir. 2004). The mashgiach had sued his employer, a Jewish assisted-living facility, for violating the Fair Labor Standards Act. He contended that his primary duties involved nothing more than "inspecting incoming food deliveries and ensuring the kosher preparation of food," duties he characterized as essentially secular. *Id.* at 308. In addition, he argued that, "apart from being an Orthodox Jew, no special training [was] required to serve as a mashgiach." *Id.*

The trial and appellate courts ultimately rejected the mashgiach's arguments, adopting instead the assisted-living facility's view that "the position of mashgiach is intrinsically religious, because maintaining a kosher diet is an integral part of Judaism and reflects a divine commandment from God." *Id.* at 308, 309. The courts reached this conclusion, however, only at the summary judgment stage after discovery had been completed. *See id.* at 304. Thus, the organization's right to be free from entangling inquiry through litigation had already been violated. *See NLRB*, 440 U.S. at 502; *see also Rayburn*, 772 F.2d at 1171 (noting that "entanglement might also result from a protracted legal process pitting church and state as adversaries"). Moreover, the organization's right to direct its internal affairs without state interference was affirmed only after ***the court*** determined that the functions performed by the mashgiach were "important to the spiritual mission of Judaism." *Shaliehsabou*, 363 F.3d at 309. Yet under this Court's *Watson* line of cases, the significance of a mashgiach to the spiritual mission of Judaism should not be subject to review by a court. Although the Fourth Circuit ultimately reached the right conclusion, the litigation process as conducted – exposing, as it did, the religious organization to the threat of having a core religious belief disregarded – was itself a violation of core First Amendment freedoms.

The difficulties courts face in properly characterizing religious activity as sacred, if allowed to do so, is further well-illustrated in *Stately v. Indian Community School of Milwaukee, Inc.*, 351 F. Supp. 2d

858, 862 (E.D. Wis. 2004). There, the court considered application of the ministerial exception to a teacher fired by a religious school that was "based on traditional Indian spiritual and cultural principles." *Id.* The court emphasized the "conceptual difficulties" posed by Native American religious beliefs to "conventional western-religious thought." *Id.* at 869. "The line between sacred and profane does not exist in Native American cultures." *Id.* at 867. Culture and religion are viewed as inseparable. *Id.* at 867-68. And "Native American religions do not consider it contradictory to fully practice more than one religion." *Id.* at 869. The court further noted that allowing the plaintiff's wrongful termination action to proceed would open questions, then and in the future, of whether "plaintiffs were ***religious enough***" or "faithfully carried out their religious obligations in the classroom." *Id.* at 870. The court further observed that "a long, legal battle draining [the school's] resources" might also result in excessive entanglement, "***if it has not already***." *Id.* (emphasis added). The court, in essence, would have been forced in the course of reaching a judgment to identify and appraise the beliefs and practices of Indian religions that are only vaguely defined by the religions themselves – a certain recipe for misconstruing core religious beliefs.

In this regard, many seemingly secular activities take on deep religious significance within specific faith traditions. For Sikhs, for example, operating a community kitchen and providing meals (*langar*) to the needy and vulnerable is an indispensible element

of religious worship. For some temple-centric religions, the actual process of constructing a temple carries deep religious significance. Hindu temple architects and artisans follow ancient religious traditions in their work. For others, temple overseers may be tasked specifically to ensure that construction workers follow religion-based standards and refrain from profane acts that might desecrate the temple. For other religious organizations, meditation is a form of worship, distributing aid through prescribed means is an essential sacred ritual, and counseling and healing are acts inspired by deity. But because such religious functions – at least from the external view – may be indistinguishable from the same activities carried out for secular purposes, courts trying to parse the sacred from the profane jeopardize the ability of religious organizations to define and carry out their own sacred missions.

Nor is this risk limited to minority religions. Indeed, it is likely manifest across all religions in a variety of forms.

> When the Pope washes feet on the Thursday before Easter, that is not secular hygiene, and the Pope is not a pedicurist. Confession to a priest and confession to a psychiatrist may have the same content, but that does not make confessing to a priest secular. Fitness clubs and Falun Gong both perform calisthenics. Religious missionaries and Peace Corps volunteers both perform humanitarian work, but only the latter is secular. Humanitarian work may be a secular or a religious

> activity, depending on the motivation and meaning among those who perform it.

Spencer v. World Vision, Inc., 633 F.3d 723, 745 (9th Cir. 2011) (Kleinfeld, J., concurring). But minority religions whose faith traditions are often foreign to judges and jurors and who lack political and financial clout to defend against misconceptions are particularly susceptible to having their religious freedoms infringed.

> [I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission.

Corp. of Presiding Bishop, 483 U.S. 327, 336 (1987). Thus, protecting the First Amendment freedoms of all religious organizations requires a robust ministerial exception that gives at least some deference to religious organizations' own definition of what is sacred to their faith.

CONCLUSION

Religious organizations should be "free to 'select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.'"

Amos, 483 U.S. at 342 (quoting Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981)). This principle is firmly established in the Court's *Watson* line of cases, *see id.* (citing *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) and *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952)), which are animated by a "spirit of freedom" derived from the First Amendment's Free Exercise and Establishment clauses, *see Kedroff*, 344 U.S. at 116. The Sixth Circuit's approach, in contrast, focuses on trying to restrict the ministerial exception to precise boundaries dividing the sacred and secular. This attempt, however, is intrinsically antithetical to the First Amendment. Religious worship and rituals are frequently identical in their physical manifestation to secular behavior and may be distinguished only by the underlying doctrines and internal beliefs that motivate them. Thus, the parsing and weighing that would be necessary for courts to separate the seemingly secular from the obviously sacred would inherently invade the prerogative of religious organizations to determine on their own how to define their faith and carry out their religious missions. *See Amos*, 483 U.S. at 343 ("[D]etermining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs."). The autonomy for religious organizations "enshrined in the First Amendment plainly rank[s] high 'in the scale of our national values.'" *NLRB v.*

Catholic Bishop of Chicago, 440 U.S. 490, 501 (1979). Its protection requires a clear standard giving reasonable deference to qualified religious organizations in selecting those who will carry out their missions. Such a standard, at minimum, must include persons like Perich who are employed by a religious organization, based at least in part on their religious qualifications, and who perform some religious functions. *See Starkman v. Evans*, 198 F.3d 173, 176 (5th Cir. 1999) (adopting similar test); *Alcazar v. Corp. of the Catholic Archbishop*, 598 F.3d 668, 676 (9th Cir. 2010) (same), *aff'd en banc without adopting test*, 627 F.3d 1288 (2010). For all these reasons, the Sixth Circuit's judgment should be reversed, and the district court's judgment reinstated.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF OF NAACP LEGAL DEFENSE FUND, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, NATIONAL WOMEN'S LAW CENTER, NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, DISABILITY RIGHTS ADVOCATES, BAZELON CENTER FOR MENTAL HEALTH LAW, AND THE NATIONAL COUNCIL ON INDEPENDENT LIVING AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

Amici are civil rights groups committed to the effective enforcement of our nation's civil rights laws, consistent with the important rights of individuals and religious institutions protected by the First Amendment.

For seven decades, the NAACP Legal Defense & Educational Fund (LDF) has represented parties in litigation before the Supreme Court involving matters of racial discrimination. As a party or as amicus curiae, LDF has participated in federal civil rights litigation in numerous cases, including *Bob Jones University v. United States* (as amici curiae), 461 U.S. 574 (1983), *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); and *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). LDF has an interest in the vigorous enforcement of the nation's civil rights laws as a means of effectuating the equality principles established by the Constitution.

The Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by

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[1] The parties have consented to the filing of this brief. No counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to its preparation or submission.

the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee is dedicated, among other goals, to eradicating all forms of workplace discrimination affecting racial and ethnic minorities, women, individuals with disabilities, and other disadvantaged populations.

The National Women's Law Center (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace. This includes not only the right to a workplace that is free from all forms of discrimination and exploitation, but also access to effective means of enforcing that right and remedying discrimination and exploitation. NWLC has prepared or participated in the preparation of numerous amicus briefs in cases involving sex discrimination in employment before the Court.

The National Partnership for Women & Families (formerly the Women's Legal Defense Fund) is a national advocacy organization that develops and promotes policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Since its founding in 1971, the National Partnership has worked to advance equal employment opportunities through several means, including by challenging discriminatory employment practices in the courts.

The Disability Rights Education and Defense Fund, Inc., (DREDF), based in Berkeley, California, is a national non-profit law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. Founded in 1979, DREDF pursues its mission through education, advocacy and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal disability civil rights laws.

Disability Rights Advocates (DRA) is a non-profit public interest law firm that specializes in high impact civil rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. DRA works to end discrimination in areas such as access to public accommodations, public services, employment, transportation, education, employment and housing. DRA's clients, staff and board of directors include people with various types of disabilities. Based in Berkeley, California, DRA strives to protect the civil rights of people with all types of disabilities.

The Judge David L. Bazelon Center for Mental Health Law is a national non-profit advocacy organization that provides legal assistance to individuals with mental disabilities. The Center was founded in 1972 as the Mental Health Law Project. Through litigation, policy advocacy, education and training, the Center promotes the rights of individuals with mental disabilities to participate equally in society, including in the workplace. Much of our work involves efforts to remedy disability-based discrimination through enforcement of the Americans with Disabilities Act and other civil rights laws.

The National Council on Independent Living (NCIL) is the oldest cross-disability, national grassroots organization run by and for people with disabilities. NCIL's membership is comprised of centers for independent living, state independent living councils, people with disabilities and other disability rights organizations. NCIL's mission is to advance the independent living philosophy and to advocate for the human rights of, and services for, people with disabilities to further their full integration and participation in society.

SUMMARY OF ARGUMENT

Civil Rights enforcement and religious freedom are compatible, and any judicially crafted rule that would presume the contrary is inconsistent with the Constitution's promise of Equal Protection, and with the rich history of ensuring that promise in which many religious denominations have actively participated.

Petitioner does not dispute that neither the Americans with Disabilities Act (ADA) nor any other civil rights statute categorically exempts parochial school teachers from their protections. Instead, petitioner invokes the "ministerial exception" developed by the lower courts to enforce the restrictions of the First Amendment. Applying that categorical exception to parochial school teachers would be appropriate only if the First Amendment categorically prohibits protecting such teachers from retaliation and discrimination. It does not.

1. Treating parochial school teachers as "ministers" excluded from the protection of anti-discrimination statutes whenever their employers

deem them to have "important religious duties," as petitioner requests, *see* Petr. Br. 19, prohibits far more applications of civil rights statutes than the First Amendment itself.

Civil rights laws, many designed specifically to enforce constitutional rights, are neutral toward religion and generally applicable. Ordinarily, such generally applicable laws are constitutional so long as they rationally serve a legitimate governmental interest, even if they burden the exercise of First Amendment rights. But even if greater scrutiny were appropriate, petitioner would be required to show at the very least that application of a particular statutory requirement to its employment decisions imposed a significant burden on its First Amendment rights. In most cases, parochial schools cannot make that showing because the discrimination prohibited by civil rights laws is not required (and often is prohibited) by the schools' own religious teachings. And even if a school could show a First Amendment burden, civil rights statutes advance compelling governmental interests that justify prohibiting discriminatory treatment of teachers employed by religious organizations.

This is particularly true of anti-retaliation provisions. Effective enforcement of the nation's laws requires assistance from ordinary citizens in reporting violations, cooperating in investigations, and testifying in trials and administrative proceedings. The expansive ministerial exception petitioner proposes would undermine the basic operations of our justice system, allowing parochial schools to openly fire teachers not only for opposing violations of their own rights, but also for advocating

the rights of others (including those, like secretaries and janitors, whom petitioner acknowledges fall outside any ministerial exception); for truthfully responding to the questions of government investigators; or even complying with a subpoena to testify in court. The logic of the exception petitioner advances would even preclude enforcement of state laws that require teachers to report evidence of child abuse to authorities, subjecting them to retaliation by their employers for going outside the school or the church to resolve what the employer may consider to be an internal problem.

Petitioner claims that such laws conflict with a Lutheran teaching that congregants should never sue each other or the Church. But this is a religious interest that simply cannot be accommodated by a constitution establishing a system of government. The First Amendment presupposes a functional system of law enforcement and adjudication. Neither can exist if religious entities are allowed to opt out of the secular legal system.

2. Nor does subjecting parochial schools to neutral, generally applicable civil rights laws inevitably entangle courts in religious matters in violation of the Establishment Clause. A court need not evaluate the validity of religious doctrine to determine whether a teacher was fired for complaining to the Equal Employment Opportunity Commission (EEOC). To the extent that some remedies may pose special entanglement risks, or certain religious positions may be particularly prone to Establishment Clause problems, those risks are appropriately addressed in as-applied challenges.

Rejecting petitioner's broad and unprecedented categorical exception does not leave religious institutions without protection. In recognition of First Amendment considerations, Congress has repeatedly made legislative accommodations for religious institutions and employers, enacting numerous special exemptions for them in a wide range of statutes. Where necessary, further expansion of those exemptions can be pursued through the political process. Moreover, religious employers, like any other litigant, may attempt to show that their First Amendment rights are violated by the application of a civil rights statute on the facts of a particular case. But they are not entitled to avoid liability for violations of fundamental civil rights even when complying with the law imposes no legally cognizable burden on their First Amendment interests.

ARGUMENT

I. The First Amendment Does Not Require Congress To Categorically Exempt Parochial School Teachers From The Protection Of Anti-Retaliation Laws.

Although petitioner invokes the so-called "ministerial exception," the facts of this case present only the question whether Congress may constitutionally prohibit retaliation against parochial school teachers. Even if there were a constitutional basis for a categorical exception for members of the clergy, there would be no cause to extend that exception to this case unless petitioner could show that applying civil rights statutes to parochial school

teachers like respondent will always violate the First Amendment.

Petitioner cannot make that showing. Civil rights statutes in general, and anti-retaliation provisions in particular, advance compelling governmental interests and frequently impose no significant burden on First Amendment rights. While the Constitution may preclude some applications of some civil rights requirements to some positions in some religious institutions, such claims are appropriately considered through as-applied challenges based on the particular facts of each case.

A. A Categorical Exception For Parochial School Teachers With Religious Duties Would Be Appropriate Only If The ADA Could Never Constitutionally Apply To Such Teachers.

1. The Americans with Disabilities Act and other civil rights statutes do not implicate the Constitution's unyielding protection of religious belief. Nor do these laws regulate the content of religious doctrine; attempt to resolve questions "'of faith, or of ecclesiastical rule, custom or law'"; or direct religious institutions to bestow religious authority upon particular individuals. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 113 (1952) (quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1871)). Instead, civil rights statutes regulate conduct, in this case the commercial conduct of employing teachers who typically instruct students of many faiths – Lutherans, non-Lutherans, and even students whose families are "'unchurched,'" Perich Br. 4 (citation omitted) – in the course of performing an educational

service that is constitutionally subject to significant governmental regulation, *see Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925).

In doing so, the statutes do not discriminate against any particular religion, or against religious employers in general. They are neutral, generally applicable laws that may, in some applications, impose an incidental burden on the religious practices of some institutions.

2. This Court has long judged the constitutionality of such statutes by comparing the burden imposed on First Amendment interests against the countervailing governmental interests advanced by the statute.[2] "It is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303 (1985). Thus, "[t]he preliminary

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[2] *See, e.g., Boy Scouts of Am. v. Dale*, 530 U.S. 640, 658-59 (2000) (in assessing freedom of association claim, "the associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other"); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (weighing infringement on right to association against "the State's compelling interest in eliminating discrimination against women"); *Roberts v. United States Jaycees*, 468 U.S. 609, 622-29 (1984) (same); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (applying balancing test to Free Exercise claim to exemption from compulsory education law); *Gillette v. United States*, 401 U.S. 437, 461-62 (1971) (same for claim to exemption from military draft).

inquiry in determining the existence of a constitutionally required exemption is whether" the challenged law "interferes with the free exercise rights" of those seeking the exemption. *United States v. Lee*, 455 U.S. 252, 256-57 (1982).[3]

Showing that interference is necessary, but not sufficient. "The mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981). The court must also consider the government's countervailing interest. *See id.*

In most instances, a neutral, generally applicable statute that imposes a substantial burden on religious practice need only bear a rational relationship to a legitimate governmental interest. *See Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990). But even when greater scrutiny is required, a burden on First Amendment rights is still a necessary prerequisite. *See, e.g., Wisconsin v. Yoder*,

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[3] Likewise, a prerequisite to any successful freedom of association claim is proof that the challenged law burdens associational rights. *See Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989) ("To assess the constitutionality of a state election law, we first examine whether it burdens rights protected by the First and Fourteenth Amendments."); *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988) (rejecting freedom of association challenge to civil rights statute because the law "[did] not affect 'in any significant way' the ability of individuals to form associations that [would] advocate public or private viewpoints") (citation omitted).

406 U.S. 206, 215-17 (1972). And even under strict scrutiny, a court must sustain the statute if it is narrowly tailored to serving a compelling governmental interest. *See, e.g.*, *Lee*, 455 U.S. at 257 ("The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."); *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983) (same); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (same for expressive association claims).

3. Viewed in light of this constitutional tradition, the exception petitioner seeks is extraordinary. Petitioner insists that all it must show is that its employee has religious responsibilities the school deems "important," Petr. Br. 19 – it need not prove that applying the statute to that employee imposes any burden on religious practice, nor is the government permitted to defend the statute's application by showing that it is appropriately tailored to a compelling governmental interest.

That *some* applications of a statute might not survive constitutional scrutiny does not justify a categorical, irrebuttable presumption that *every* application is unconstitutional. To the contrary, this Court has consistently eschewed such categorical rules, asking instead whether a law imposes an unconstitutional burden on the First Amendment rights of particular parties in particular cases. *See, e.g.*, *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544-49 (1987); *Roberts*, 468 U.S. at 620, 627; *Prince v.*

Massachusetts, 321 U.S. 158, 171 (1944). In fact, amici are aware of no other comparable instance in which the Court has created, as a matter of constitutional law, a defense that prophylactically extends further than the Constitution itself.[4]

Accordingly, a categorical exception for parochial school teachers would only be appropriate if petitioner could show that every application of the defense prevents an unconstitutional application of the statute. This, petitioner cannot do.

B. *Providing Anti-Retaliation Protection To Parochial School Teachers Will Rarely Violate The First Amendment.*

Petitioner does not dispute that the ADA's anti-retaliation provision would pass muster under the rational basis test of *Smith*. Instead, it insists that *Smith* is distinguishable and that its right to retaliate against its employees is entitled to greater constitutional protection than *Smith* affords. Petr. Br. 23-26. The Court need not resolve that contention because under any standard of review, anti-retaliation provisions have abundant constitutional applications to parochial school

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[4] Petitioner does not claim that the ADA is unconstitutionally overbroad on its face, nor could it. Even if the First Amendment precludes the ADA's application to some subset of workers employed by religious organizations, petitioner cannot show that the statute as a whole — which applies to employees of every sort, the vast majority of whom are employed in entirely secular professions — is "substantially overbroad." *New York State Club Ass'n*, 487 U.S. at 14 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

teachers. Such laws serve a governmental interest of surpassing importance while rarely imposing any cognizable burden on First Amendment interests.

1. *The Government Has A Compelling Interest In Preventing Retaliation Against Those Who Assist In The Enforcement Of The Law.*

Anti-retaliation provisions are important components of the enforcement regimes of a broad range of state and federal statutes that may legitimately apply to religious institutions. *See, e.g.*, 29 U.S.C. § 660(c) (Occupational Safety and Health Act); 29 U.S.C. § 215(a)(3) (Fair Labor Standards Act); 29 U.S.C. § 2615(a)(2) (Family and Medical Leave Act); 38 U.S.C. § 4311(b) (Uniformed Services Employment and Reemployment Rights Act); 29 U.S.C. § 1140 (Employee Retirement Income Security Act); 42 U.S.C. § 7622(a) (Clean Air Act); 33 U.S.C. § 1367(a) (Clean Water Act); 42 U.S.C. § 9610(a) (Comprehensive Environmental Response, Compensation, and Liability Act); 29 U.S.C. §§ 206(d), 215(a)(3) (Equal Pay Act); 42 U.S.C. § 2000e-3(a) (Title VII); 29 U.S.C. § 623(d) (Age Discrimination in Employment Act); *see also*, *e.g.*, N.Y. LAB. LAW § 740(2)(a) (prohibiting retaliation against employees for reporting any violation of law that poses a "substantial and specific danger to the public health or safety"); TEXAS PENAL CODE ANN. § 36.06(a)(1) (prohibiting retaliation against those who report crime or act as witness); ARIZ. REV. STAT. § 21-236(B) (prohibiting retaliation against employees for performing jury service); FLA. STAT. ANN. § 440.205 (protecting employees who file workers' compensation claims); UTAH CODE ANN.

§ 53A-11a-202(1) (prohibiting retaliation against school employees who report bullying or harassment of students at school); N.Y. VEH. & TRAF. LAW § 375-a(2) (prohibiting adverse action against bus drivers who refuse to operate vehicle with faulty brakes or steering); CAL. HEALTH & SAFETY CODE § 1432(a) (prohibiting retaliation against nursing home employees who report suspected violations of health and safety codes); CONN. GEN. STAT. § 17a-101e(a) (prohibiting retaliation against employees who report suspected child abuse).[5]

1. Petitioner nonetheless claims that the First Amendment precludes application of anti-retaliation provisions to a parochial school's treatment of any employee with important religious functions. *See* Petr. Br. 19. The breadth of that claim is remarkable. Under petitioner's constitutional theory, the First Amendment entitles it to fire a parochial teacher for:

- Filing a charge of discrimination with the EEOC (a right implicating the employee's

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[5] These provisions are ubiquitous in part because employer retaliation is a pervasive problem and a serious impediment to the enforcement of our nation's laws. For example, one study found that among women complaining of sex discrimination, "over 40% of the respondents cited one or more instances of retaliation." Janet P. Near & Tamila C. Jensen, *The Whistleblowing Process: Retaliation and Perceived Effectiveness*, 10 WORK & OCCUPATIONS 3, 17 (1983); *see also* Louise F. Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 122 (1995) (finding that sixty-two percent of state employees surveyed stated that they suffered retaliation after reporting harassment).

First Amendment right to petition the government for redress of grievances);

- Objecting to discrimination against other employees, even those plainly outside the protection of any ministerial exception (*e.g.*, a janitor, *see* Petr. Br. 2);
- Cooperating with government investigations, including investigations regarding discrimination against other employees or students, workplace safety violations, or even crimes committed at the school;[6] or
- Testifying in administrative proceedings or hearings in court, even under government subpoena, and even in a proceeding against someone other than the school (*e.g.*, divorce proceedings involving the parents of a student or a civil suit between church members).

Nor would the exception be limited to cases in which the retaliation took the form of termination. It would presumably include, for example, cases in which an employee who filed an EEOC complaint was subjected to pervasive abuse and harassment, or even physical assault, in the hopes of persuading the

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[6] *See, e.g.*, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171-72 (2005) (physical education teacher allegedly fired from coaching position for complaining that unequal treatment of girls' basketball team violated Title IX of the Education Amendments of 1972); *EEOC v. Pacific Press Publ'g Ass'n*, 676 F.2d 1272, 1275 (9th Cir. 1982) (employee of religious publishing company alleged retaliation for "participating in proceedings involving . . . discrimination [claim] brought by a co-worker").

teacher to quit. *Cf., e.g.*, *Richmond-Hopes* v. *City of Cleveland*, No. 97-3595, 1998 WL 808222, at *1 (6th Cir. Nov. 16, 1998) (per curiam) (supervisor allegedly told female complainant's male coworkers that "he wouldn't hold it against any of them if 'something happened on the job' to her," and that "'payback is a bitch'"); *Pereira* v. *Schlage Elecs.*, 902 F. Supp. 1095, 1099 (N.D. Cal. 1995) (employer allegedly took no action after learning that plaintiff's co-workers had responded to her sex discrimination complaints by threatening to kill her and her family, burn down her house, and kidnap her and leave her in a bad neighborhood "so people can rape and kill" her).

At the same time, there is no basis for limiting a ministerial exception to cases in which an employee is fired for opposing her employer's allegedly unlawful conduct. The defense would apply equally to a case in which a teacher was fired for reporting to the police unlawful conduct of a student's parent, or the illegal activities of a significant school donor. *Cf., e.g.*, *Teacher Says She Was Fired for Reporting on Student Abuse*, MICH. LAW. WKLY., May 3, 2010 (reporting on lawsuit alleging that teacher was fired by school after reporting suspected sexual abuse of students in their homes and foster homes).

Nor is there any principled basis for restricting the proposed ministerial exception to anti-retaliation provisions in civil rights statutes or, as this case illustrates, to cases brought by private litigants. Indeed, petitioner's rationale would equally require providing immunity to criminal prosecution for witness tampering, should the school threaten to fire a teacher if she reports a violation of the law or appears as a witness in court. *Cf., e.g.*, Stephen

Hunt, *Ex-assistant principal enters pleas in child-slapping case*, SALT LAKE TRIB., June 28, 2010 (assistant principal pleaded guilty to witness tampering in child abuse case for allegedly warning teacher not to report incident).[7] If anything, the possibility of criminal prosecution would impose a greater burden on a school's interest in terminating unwanted employees.

2. At the same time, the government's interest in preventing retaliation against those who report unlawful conduct or cooperate in enforcement proceedings is paramount.

It is every citizen's "right and his duty to communicate to the executive officers any information which he has of the commission of an offense against [the] laws" of this country. *In re Quarles*, 158 U.S. 532, 535 (1895). And "it is the duty of th[e] government to see that he may exercise this right freely, and to protect him from violence while so doing, or on account of so doing." *Id.* at 536. Anti-retaliation provisions fulfill that responsibility while also ensuring the effective enforcement of the nation's most important laws.

This Court thus has recognized that "[r]eporting incidents of discrimination is integral to" the enforcement of civil rights laws. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 (2005). The government necessarily relies on those with first-hand knowledge to bring violations to enforcement

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[7] *Available at* http://www.sltrib.com/sltrib/home/49843167-76/cabanillas-district-case-pleas.html.csp.

agencies' attention. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) ("Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses."); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1333 (2011) (the Fair Labor Standards Act "relies for enforcement . . . upon information and complaints received from employees seeking to vindicate rights claimed to have been denied") (citation and internal quotation marks omitted). Thus, Congress created the EEOC charge process to alert the government to potential violations of employment discrimination laws, knowing that the EEOC would otherwise lack the resources to monitor compliance with statutes applying to millions of employees across the country.

"Without protection from retaliation, individuals who witness discrimination would likely not report it . . . and the underlying discrimination would go unremedied." *Jackson*, 544 U.S. at 180-81. "[F]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination." *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 129 S. Ct. 846, 852 (2009) (quoting Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 20 (2005)). Employees are especially vulnerable to coercion by their employers, upon whom the livelihood of their families depends. Consequently, "if retaliation were not prohibited, [the statutory] enforcement scheme would unravel." *Jackson*, 544 U.S. at 180.

Teachers often play a particularly important role in enforcing the rights of others who may be less able to protect themselves. *See Jackson*, 544 U.S. at 181

(noting that physical education teacher was better positioned to effectively oppose the unequal treatment of female athletes than the young students themselves). For instance, most states require teachers to report evidence of child abuse, given their special relationship with students. *See* U.S. DEP'T HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, MANDATORY REPORTS OF CHILD ABUSE AND NEGLECT: SUMMARY OF STATE LAWS (2010).[8] Many states also expressly protect mandatory reporters from retaliation by their employers. *See, e.g.*, CONN. GEN. STAT. § 17a-101e(a); 325 ILL. COMP. STAT. 5/9.1; OKLA. STAT. tit. 10A, § 1-2-101(b)(4); MASS. GEN. LAWS ch. 119, § 51A(h).[9] Applying a ministerial exception to parochial school teachers would be devastating to states' undeniably compelling interest in protecting children from abuse.[10]

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[8] *Available at* http://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.cfm.

[9] States apply the same protection to employees of nursing homes and similar facilities, which are often church-affiliated and therefore presumably entitled to invoke petitioner's ministerial exception. *See, e.g.*, N.M. STAT. ANN. § 30-47-9(E); CAL. GOV'T CODE § 12940(g); R.I. GEN. LAWS §§ 23-17.8-4(a), 40.1-27-6; MASS. GEN. LAWS ch. 19C, § 11; N.Y. PUB. HEALTH LAW § 2803-d(8).

[10] *Cf., e.g.*, *Dayner v. Archdiocese of Hartford*, 301 Conn. 759 (2011) (applying ministerial exception to preclude claim by parochial school principal that she was fired after (1) confronting her supervisor with students' allegations that he had used sexually explicit language in front of eighth grade students and then (2) refusing the supervisor's order to report the students who accused him to the department of children and families); Pet. for Cert. at *16 n.2, *Weishun v. Catholic Diocese*,

No system for investigating or adjudicating violations of the law can function if interested parties are permitted to pressure complainants or witnesses to refuse to cooperate. Accordingly, any burden on parochial schools' First Amendment interests in retaliating against their teachers is more than outweighed by the countervailing needs of law enforcement.

2. Enforcement Of Anti-Retaliation Provisions Will Rarely Create A Cognizable Burden On The Exercise Of First Amendment Rights.

In fact, in most cases, the burden anti-retaliation laws impose on First Amendment rights is limited.

1. Anti-retaliation laws ordinarily have no effect on religious criteria for hiring. The protection usually applies, as in this case, to individuals whom the school has already determined meet the essential qualifications for the job. Thus, rather than limiting a school's choices regarding *whom* or *what kind of person* to employ, an anti-retaliation provision regulates the school's treatment of that person as an employee. The school cannot prohibit the worker from reporting violations of the law to the authorities or, what is effectively the same thing, fire her if she does.

Limiting a school's authority over its employees' conduct in this way is an inevitable consequence of

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No. 10-760 (U.S.), 2010 WL 5043331 (parochial school teacher allegedly fired for "reporting suspected sexual abuse of a student").

subjecting the school to any neutral, generally applicable law. For example, environmental laws may preclude a school from pouring certain chemicals from the science lab into the city sewer system. Such laws necessarily limit the school's power over its employees – the school cannot order a teacher to do what the law forbids. But that limitation on the school's authority does not violate any First Amendment right. *See Smith*, 494 U.S. at 889 (citing environmental protection laws as example of permissible neutral, generally applicable law). Prohibiting the school from firing an employee for reporting an environmental violation is simply the other side of the same coin. If a state can prohibit a school from using peyote in its religious services, *see id.* at 891, then surely it can prohibit a school from firing a teacher for reporting it. To be sure, the legal regime may impose a burden on the exercise of religion. But the religious burden arises from the underlying prohibition on peyote use, a restriction the Constitution permits. The anti-retaliation proscription simply prevents the school from evading enforcement of a legitimate law.

2. Petitioner nonetheless claims that it has a particular religious objection to anti-retaliation laws. The Lutheran Church, petitioner argues, "has long taught that fellow believers generally should not sue one another in secular courts . . . ." Petr. Br. 54. The ADA's anti-retaliation provision, petitioner claims, unconstitutionally burdens the school's ability to put that teaching into practice by firing teachers who resort to civil litigation. This argument is unavailing.

Initially, it bears noting that the ministerial exception petitioner proposes is poorly tailored to the school's asserted religious interest. Petitioner does not claim that the Church prohibits litigation only when brought by ministers and teachers with important religious duties. *See* Petr. Br. 54 (explaining that all "lawsuits between believers [are] scandalous"). Why the First Amendment would not also bar suits by church members who are custodians, secretaries, and teachers with no religious duties, petitioner does not say.

But petitioner's argument suffers from an even more fundamental defect. The Court need not question petitioner's description of its religious beliefs, or decide whether those beliefs were the true reason behind its actions, because there are some religious beliefs that a constitution establishing a system of government cannot accommodate, and this is one of them. For example, the First Amendment presupposes a government that is able to "maintain[] a sound tax system, free from myriad exceptions flowing from a wide variety of religious beliefs." *Hernandez v. Comm'r*, 490 U.S. 680, 699-700 (1989) (citation and internal quotation marks omitted). The First Amendment likewise presupposes the government's authority to ensure a fair and effective legal system. Just as the "tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief," *Lee*, 455 U.S. at 260, the legal system could not operate if religious entities were permitted to opt-out of it, or prevent their employees from participating in it, because of a religious opposition to secular dispute

resolution. Accordingly, a burden on a church's religious belief that it should not be sued is simply not a burden the First Amendment can recognize.[11]

II. Applying Other Civil Rights Protections To Parochial School Teachers Does Not Ordinarily Violate The First Amendment.

This case involves only the application of an anti-retaliation measure to a parochial school. But applying a ministerial exception to parochial school teachers is no more appropriate when other civil rights provisions are invoked.

A. Applying Civil Rights Statutes To Parochial School Teachers Will Infrequently Impose Any Significant First Amendment Burden.

While religious teachings may occasionally require actions that civil rights statutes otherwise prohibit, such conflict is far from universal, or even common, and does not arise in this case.

1. Some religions require that certain positions be held by individuals of a particular sex, race, or other immutable characteristic. There is no doubt that when applied to prohibit discrimination required

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[11] Even if the petitioner's asserted religious basis for opposing litigation rendered the ADA's anti-retaliation provision unconstitutional in this case, petitioner does not argue that its belief is so prevalent as to render the anti-retaliation provision unconstitutional in all applications. Again, the fact that some religious employers may have colorable First Amendment objections to some applications of a statute does not justify the blanket immunity petitioner seeks.

by religious doctrine, civil rights statutes may significantly burden First Amendment rights.

But petitioner does not claim (much less demonstrate) that such conflict arises in every religious institution with respect to every position to which petitioner would extend the ministerial exception. To the contrary, a great many religious institutions in this country advocate the principles of equality and fair treatment embodied in the nation's civil rights laws. *See, e.g.*, AMERICAN LUTHERAN CHURCH, EQUALITY OF OPPORTUNITY – A CIVIL RIGHT (1966).[12] While it is understandable that some religious employers may prefer not to be sued when a worker alleges that the institution has fallen short of its ideals in practice, few can claim that civil rights mandates run afoul of their religious teachings or otherwise burden First Amendment rights.

In this case, for example, petitioner presumably has no religious objection to hiring women to teach in

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[12] *Available at* http://www.elca.org/What-We-Believe/Social-Issues/Journal-of-Lutheran-Ethics/Portfolios/Predecessor-Church-Body-Documents/American-Lutheran-Church/Equality-of-Opportunity-A-Civil-Right-A-Statement-of-The-American-Lutheran-Church-1966.aspx. *See also* Perich Br. 5-6 (quoting Lutheran Church's employment resource manual); Micah D. Greenstein & Howard Greenstein, *"Then and Now": Southern Rabbis and Civil Rights*, *in* THE QUIET VOICES: SOUTHERN RABBIS AND BLACK CIVIL RIGHTS, 1880S TO 1990S 325 (Bauman K. Mark & Berkeley Kalin, eds., 1997) (discussing the contribution of rabbis to the Civil Rights Movement); C. ERIC LINCOLN, THE BLACK CHURCH SINCE FRAZIER 108-122 (1974) (discussing role of black clergy in the origins of the Civil Rights Movement).

its schools, given that it hired respondent. Accordingly, it cannot claim that applying Title VII's prohibition on sex discrimination to its hiring decisions at the school requires it to violate any religious tenet.

Nor does petitioner claim that it has any religious grounds for refusing to hire or retain individuals with disabilities. Instead, its complaints are entirely secular and common among small employers and private schools – it objects to the administrative inconvenience of having to reinstate a teacher in the middle of a semester, worries that her disability may create a safety risk, and perhaps doubts whether she can perform her job given her condition. Petr. Br. 8-9.[13] But "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause . . . ." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 713 (1981); *see also Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("[T]o have the protection of the Religion Clauses, the claims must be rooted in religious belief."). Financial, administrative, and other secular burdens imposed by neutral, generally applicable laws do not implicate the First Amendment simply because they fall upon religious as well as non-religious organizations. *See*,

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[13] Congress designed the ADA to take account of such operational concerns. *See, e.g.*, 42 U.S.C. § 12112(b)(5)(A) (employers need not provide accommodations that "impose an undue hardship"); *id.* § 12113(b) (providing defense when an employee poses "a direct threat to the health or safety of other individuals in the workplace"); *id.* § 12111(8) (plaintiff employee must be able to perform "the essential functions of the employment position" with or without accommodations).

e.g., *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 391 (1990) ("[T]o the extent that imposition of a generally applicable tax merely decreases the amount of money [a ministry] has to spend on its religious activities, any such burden is not constitutionally significant."); *Alamo Found.*, 471 U.S. at 303-06 (application of the Fair Labor Standards Act's recordkeeping and wage and hour requirements to religious employer does not violate Establishment or Free Exercise Clauses); *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961) (a First Amendment violation does not arise simply because a neutral law "operates so as to make the practice of [one's] religious beliefs more expensive").

2. While restrictions on discrimination in certain limited circumstances may interfere with a religious institution's doctrinally compelled criteria for employment in some small subset of religiously significant positions, civil rights statutes also contain other requirements that, like anti-retaliation provisions, regulate the treatment of the employees the institution has decided meet its essential religious qualifications. Those requirements are particularly unlikely to impose any significant burden on religion.

For example, once a parochial school chooses to hire a woman as a teacher, the Equal Pay Act prohibits it from paying her less than her male counterparts for the same work. *See* 29 U.S.C. § 206(d)(1). And if the school hires a male teacher, it may not deny him the leave guaranteed to all covered employees by the Family and Medical Leave Act to care for a sick child. *See* 29 U.S.C. § 2612(a)(1)(C). The ADA likewise imposes a range of obligations

upon employers once they hire an individual with a disability. The employer may be required to modify its physical facilities or make reasonable accommodations to its practices and policies. *See* 42 U.S.C. § 12111(9). And it may not segregate employees with disabilities, *id.* § 12112(b)(1), or pay them less because of their conditions, *id.* § 12112(a).

Even in the rare instance in which a parochial school's religious beliefs compel an employment action prohibited by a civil rights statute, the school may still raise an as-applied challenge to the statute's application. There is no constitutional reason to give religious schools free rein to engage in discrimination that has no connection with freedoms the First Amendment was enacted to protect.

B. The Government Has A Compelling Interest In The Elimination Of Employment Discrimination.

Even if civil rights laws pervasively imposed significant burdens on religious practice, that would not justify a categorical exemption for parochial schools. This Court previously has sustained civil rights statutes from First Amendment challenges even when applying strict scrutiny, given governments' "compelling interest in eliminating discrimination . . . ." *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (sex discrimination); *see also Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (same); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (racial discrimination in education).

There is no basis for a different result here. Congress enacted the ADA in response to abundant

evidence that discrimination on the basis of disability in employment and other areas had left individuals with disabilities "severely disadvantaged socially, vocationally, economically, and educationally . . . ." 42 U.S.C. § 12101(a)(6). Congress's observation that a person's "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society," *id.* § 12101(a)(1), remains true whether a teacher with a disability is employed by a public, private secular, or parochial school. And its interest in promoting the economic self-sufficiency and integration of people with disabilities is at least as compelling as other interests this Court has found sufficient to justify burdening religious practices. *See, e.g.*, *Braunfeld*, 366 U.S. at 607-08 (state has a compelling interest in establishing a uniform day of rest).

III. Enforcement Of Otherwise Constitutional Civil Rights Requirements To Religious Entities Ordinarily Does Not Risk Excessive Entanglement With Religion.

Petitioner likewise has not shown that every application of a civil rights law, much less every application of the ADA's anti-retaliation provision, will result in excessive government entanglement with religion in violation of the Establishment Clause. If anything, the ministerial exception petitioner proposes creates the greater entanglement risk.

1. Unconstitutional government entanglement with religion does not arise simply because a religious institution is subjected to neutral, generally applicable laws. To the contrary, neutrality toward

religion is the "touchstone" of the Establishment Clause. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 (2005). And applying neutral laws to religious institutions necessarily involves some degree of government interaction. *See, e.g.*, *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 394-95 (1990).

Petitioner nonetheless argues that the degree of entanglement required to enforce the ADA's anti-retaliation provision is excessive.

First, petitioner argues that reinstating an unlawfully terminated employee violates the Establishment Clause by requiring a church to accept an unwanted employee in a position of religious responsibility. Petr. Br. 50-54. But as this case illustrates, reinstatement is not always requested; here it is no longer at issue. And when it is, courts can evaluate whether that particular remedy is appropriate in light of the First Amendment interests implicated in the particular litigation.[14] The fact that constitutional problems may be raised in some cases with respect to one form of relief is no reason to adopt a categorical exemption from any liability at all.

Second, petitioner complains that allowing a money damages remedy could "have enormous

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[14] In doing so, the court could consider that a request for reinstatement to a religious office would raise substantially more serious First Amendment concerns than a request for reinstatement to a secular position with some religious responsibilities. *See* U.S. Br. 33 (noting possibility of reinstating a parochial school teacher to a non-called teaching position).

deterrent effect" on a religious employer's decision whether to terminate its employees. Petr. Br. 51. But if Congress has the authority to prohibit a school from firing a teacher for testifying in an EEOC proceeding, as it surely does, the fact that a damages remedy indirectly encourages compliance with that valid law is hardly a constitutional defect.

Third, petitioner argues that a court cannot decide a retaliation claim without overturning a religious decision. Petr. Br. 52-54. While it may be that some parochial schools will sometimes claim that a particular employment decision was undertaken for religious reasons, that defense is not inevitable. A school might, for example, simply argue that the accommodation requested under the ADA was unreasonable, or that the teacher was fired for being tardy or underperforming.[15] In such cases, there is no risk that evaluating that claim will entangle courts in religious matters. In addition, even when a school insists that it did not terminate an employee because she filed an EEOC charge, but rather because it found her religiously unfit for her position, a court "violates no constitutional rights by merely investigating the circumstances of [an employee's] discharge . . . if only to ascertain whether

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[15] Petitioner asserts that a religious employer's "proffered legitimate reasons" for firing a teacher performing important religious functions "are nearly always religious," but it cites no evidence for this factual claim (other than a case that makes the same unsupported assertion). Petr. Br. 29. It would be surprising if parochial schools – unlike their secular counterparts – never had to let teachers go for non-religious reasons.

the ascribed religious-based reason was in fact the reason for the discharge." *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 628 (1986).

In any event, even if the Court perceived a special problem in resolving claims of subjective pretext, not all civil rights claims depend on an evaluation of the employer's motives. A school violates the Equal Pay Act if it pays women teachers less than men for the same work, regardless of its motivation. *See* 29 U.S.C. § 206(d); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 640 (2007) (noting that the Equal Pay Act "does not require . . . proof of intentional discrimination"). Failure to make physical facilities accessible may violate the ADA, regardless of whether the school acts with discriminatory animus. *See* 42 U.S.C. § 12111(9). And Title VII prohibits policies that facially discriminate on the basis of sex, regardless of the employer's rationale. *Int'l Union, United Auto., Aerospace, and Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991). In cases asserting violations of these and similar provisions, courts need only ascertain the objective facts regarding the employee's treatment. *See Jimmy Swaggart Ministries*, 493 U.S. at 396 (no excessive entanglement where adjudication "involves only a secular determination").

To be sure, even when motive is not at issue, a school may claim that it has a religious objection to compliance with the law. And that as-applied challenge entails some investigation into whether a statute imposes a burden on religious practices. However, the delicacy of that inquiry has not led this

Court to abandon the requirement, implicit in the text of the First Amendment itself, that those who challenge a neutral law must show a burden on religious, rather than secular, interests. *See, e.g.*, *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981) (establishing First Amendment test under which courts must determine whether a plaintiff "terminated his work because of an honest conviction that such work was forbidden by his religion"). Nor has it led the Court to adopt broadly prophylactic exceptions for religious institutions. To the contrary, if anything, the Court has taken the opposite approach, avoiding the need to examine the sincerity of religious beliefs by declining to recognize any broad religious exemption from neutral, generally applicable laws. *See Employment Div.. v. Smith*, 494 U.S. 872, 878-79 (1990).

2. At the same time, applying a categorical exception to employees with "important religious functions," Petr. Br. 19, poses entanglement problems of its own.

This Court has warned that significant entanglement risks arise when applying an exception for religious organizations requires "the Government to distinguish between 'secular' and 'religious'" aspects of a religious entity's activities. *Hernandez v. Comm'r*, 490 U.S. 680, 697 (1989); *see also Jimmy Swaggart Ministries*, 493 U.S. at 396-97 (noting that "[i]ronically, appellant's theory, under which government may not tax 'religious core' activities but may tax 'nonreligious' activities, would require government to do precisely what appellant asserts the Religion Clauses prohibit: 'determine which expenditures are religious and which are secular'")

(citation omitted); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983) (noting approvingly a Court of Appeals' observation that "the uniform application of [a] rule to all religiously operated schools *avoids* the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of a sincere religious belief") (emphasis in original) (citation omitted); *cf. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987) (noting the Establishment Clause virtues of a statutory exemption that does not require courts to distinguish between religious and secular activities).

Petitioner's ministerial exception requires courts to determine not only whether an employee's duties are secular or religious, but also whether the religious aspects of the job are "important." Petr. Br. 19. That qualitative judgment is "'fraught with the sort of entanglement that the Constitution forbids.'" *Hernandez*, 490 U.S. at 680 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 620 (1971)).

IV. Congress Can Be Relied Upon To Make Appropriate Accommodations In Civil Rights Statutes For Religious Institutions.

A court-created, categorical exception for parochial school teachers is not necessary to protect the interests of religious organizations. The Establishment Clause permits legislatures to accommodate religious groups more liberally than the Free Exercise Clause requires. *See, e.g., Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 707-08 (1994). And legislatures have been and "can be expected to be solicitous" of religious

organizations' interests. *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990).

Congress has taken seriously concerns about the potential burden and disruption of applying civil rights laws to religious employers. The ADA itself allows religious institutions to "giv[e] preference in employment to individuals of a particular religion to perform work connected with the carrying on by such [employer] of its activities." 42 U.S.C. § 12113(d)(1). Moreover, the statute further provides that "a religious organization may require that all applicants and employees conform to the religious tenets of such organization." *Id.* § 12113(d)(2).

Title VII likewise allows religious organizations to employ only "individuals of a particular religion to perform [certain] work . . . ." 42 U.S.C. § 2000e-1(a); *see also id.* at § 2000e-2(e). Congress has also accommodated religious entities seeking to participate in federal funding programs. *See* 42 U.S.C. § 300x-65(d); 42 U.S.C. § 9858l(a)(1)(B).

These provisions are part of a broader pattern of legislative accommodation of religious institutions. *See, e.g.*, 10 U.S.C. § 983(c)(2) (exempting schools with a "longstanding policy of pacifism based on historical religious affiliation" from ban on federal funding for educational institutions that bar the Reserve Officer Training Corps from campus); 20 U.S.C. §§ 1681(a)(3), 1687 (excluding "an educational institution which is controlled by a religious organization" from Title IX's proscription against sex discrimination in federally funded educational institutions "if the application of this subsection would not be consistent with the religious tenets of such organization"); 29 U.S.C. § 1003(b)(2) (excluding

certain "church plan[s]" from requirements of the Employee Retirement Income Security Act); 42 U.S.C. § 3607(a) (providing a partial exemption from the Fair Housing Act for certain religious landlords); 18 U.S.C. § 2339A(b)(1) (excluding provision of "religious materials" from the definition of "material[ly] support[ing]" terrorists).

Some religious employers would no doubt prefer greater protection than the political branches have provided to them. And in some cases, those protections will fall short of what the First Amendment requires. But this Court need not categorically exclude parochial school teachers like respondent from the reach of civil rights legislation in order to protect the legitimate constitutional rights of religious institutions.

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit should be affirmed.

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AMICUS CURIAE BRIEF

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HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTION PRESENTED

Is the anti-retaliation provision of the Americans with Disabilities Act, 42 U.S.C. § 12203, unconstitutional as applied to the claim of respondents?

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INTEREST OF AMICUS

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.[1]

SUMMARY OF ARGUMENT

I. For two centuries American courts have heard and resolved employment-related claims of ministers. Religious organizations themselves have

[1] All parties have consented to the filing of this brief. No counsel for a party authored the brief in whole or in part and no person other than the amicus or its counsel made a monetary contribution to this brief.

filed suit asking courts to determine who was entitled to serve as the minister of a congregation. Lawsuits of this sort have been sufficiently common that both Justice Holmes and Justice Brewer wrote opinions in such cases while serving on state courts.

Since the early nineteenth century lower courts have recognized that some, but not all, of these cases turned on the resolution of theological disputes, and have declined to decide such cases. That case-specific neutral-principles approach remains the appropriate method of addressing employment disputes regarding employees of religious organizations.

II. The First Amendment right of free expression applies in equal measure to religious and non-religious organizations. While a religious organization has a particular interest in those who serve as its leaders and teachers, that is equally true of non-religious organizations that engage in expressive activity. Just as the First Amendment did not create a categorical "Scout Leader exception" in *Boy Scouts of America v. Dale*, so too the First Amendment does not create a categorical "ministerial exception."

III. Adoption of the proposed "ministerial exception" would force the lower courts to face a plethora of vexing constitutional questions.

Petitioner contends that an employee falls within the "ministerial exception" if he or she engages in "important ministerial functions." It is unclear whether this would be an objective or subjective test; petitioner appears to advance both views.

Similarly, it is unclear which types of legal claims would and would not be barred by the proposed "ministerial exception." Petitioner has advanced four different proposed standards.

ARGUMENT

I. FOR TWO CENTURIES AMERICAN COURTS HAVE RELIED ON NEUTRAL PRINCIPLES TO RESOLVE EMPLOYMENT-RELATED DISPUTES REGARDING MINISTERS

A. American Courts Have Long Resolved Employment-Related Disputes Regarding Ministers

From the earliest days of the Republic, secular courts have heard and resolved employment-related disputes regarding ministers.[2] Many of these lawsuits were brought by dismissed ministers, but a substantial number were actions by religious organizations themselves. Virtually every state in the growing union had a constitutional guarantee of freedom of religion, and there was – as petitioners and numerous amici emphasize – a long history of resistance to government appointment of clerical officials. Yet the propriety of this litigation was widely accepted so

[2] For simplicity we use the term "minister" to refer to those of any denomination who lead religious services.

long as a court could resolve the litigation without deciding a matter of theological doctrine.

Until the late twentieth century, most of the litigation brought by ministers themselves was based on contract claims.[3] Other actions were grounded on deeds of trust executed when land was donated for the building of a church[4] or on state statutes governing decisionmaking by congregational religious organizations (e.g., requiring notice to the congregation before a meeting to hire or dismiss a minister). Religious organizations as well as plaintiffs successfully invoked state laws in these disputes.[5]

The earliest post-Revolution case appears to have been *Runkel v. Winemuller*, 4 H. & McH. 429, 1799 WL 422 (Md.Gen.Ct.), commenced when Justice Chase was the Chief Judge of the Maryland General Court. Runkel asserted that he had been improperly dismissed as minister of the High Dutch Reformed Christian Church in Frederickstown, Maryland, and successfully sued for an order "to recover the pulpit ...

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[3] See pp. 5-6, *infra*.

[4] *Combe v. Brazier*, 2 Des. 431, 2 S.C. 431, 1806 WL 366 (S.C.); *Robertson v. Bullions*, 9 Barb. 64 (S.Ct. N.Y.Cty. 1850); *Feizel v. Trustees of First German Society of Methodist Episcopal Church of Wyandotte City*, 9 Kan. 592 (1872).

[5] *Landers v. Frank Street Methodist Episcopal Church*, 97 N.Y. 119 (1884); *Downes v. Bowdoin Square Baptist Soc.*, 21 N.E. 294, 296, 149 Mass. 135, 139 (1889); *Bartlett v. Hipkins*, 76 Md. 5, 23 A. 1089 (1892); *Kupperman v. Congregation Nusach Sfard*, 39 Misc.2d 107, 240 N.Y.S.2d 315 (Sup.Ct.Bronx Cty. 1963).

and the emoluments" of the position. 1799 WL 422 at *1.

A Massachusetts decision of 1807 noted that the Supreme Judicial Court of Massachusetts had repeatedly heard employment-related claims by ministers "[b]efore and since the revolution." *Avery v. Inhabitants of Tyringham*, 3 Mass. 160, 179 (1807)(Parsons, C.J.); see *id.* at 172 (noting that four earlier opinions of that court had held that appointments of ministers were for life unless otherwise stated)(Parker, J.); *Sheldon v. Congregational Parish in Easton*, 24 Pick. 281, 286-87, 41 Mass. 281, 286-87 (1836)(noting "the numerous cases which this Court unfortunately have from time to time been called upon to decide" about when a minister forfeits his contractual rights). Successful contract-based actions by dismissed ministers have continued to this day.[6] Religious organizations invoked traditional contract

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[6] *Tendler v. Bais Knesses of New Hempstead*, 52 A.D.3d 500, 860 N.Y.S.2d 551 (App.Div.2d 2008); *Trinity Baptist Church v. Howard*, 869 N.E.2d 1225 (Ct.App.Ind. 2007); *Mayhew v. Vanway*, 371 S.W.2d 90 (Tex. Ct.Civ.App. 1963); *Pape v. Ingram*, 69 N.M. 32, 363 P.2d 1209 (N.Mex. 1961); *Lynd v. Menzies*, 33 N.J.L. 162 (1868); *Whitmore v. Fourth Congregational Society of Plymouth*, 68 Mass. 306 (1854); *Sheldon v. Congregational Parish in Easton*, 24 Pick. 281, 41 Mass. 281 (1836); *Peckham v. Inhabitants of North Parish in Haverhill*, 16 Pick. 274, 33 Mass. 274 (1834); *Thompson v. Catholic Congregational Society in Rehoboth*, 5 Pick. 469, 22 Mass. 469 (1827); *Cochran v. Inhabitants of Camden*, 15 Mass. 296, 1818 WL 1748 (Mass. 1818); *Avery v. Inhabitants of Tyringham*, 3 Mass. 160 (1807).

principles, or state statutes, in defeating contract claims.[7]

There have also been repeated lawsuits by ministers claiming that they had not been paid for work they had actually done.[8] These wage claims were sometimes intertwined with disputes about the propriety of a dismissal, e.g. where a minister had continued to conduct services after a disputed dismissal, or where a minister asserted both compensation and unlawful termination claims. When a minister asserting a wrongful dismissal claim asked for the salary that had been withheld following that termination, he would typically argue that he was entitled to compensation because the defendant itself had prevented him from meeting his contractual obligation to continue serving the congregation.

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[7] *Bartlett v. Hipkins*, 76 Md. 5, 23 A. 1089 (1892); *West v. First Presbyterian Church of St. Paul*, 41 Minn. 94 (1889); *Congregation of Children of Israel v. Peres*, 42 Tenn. 620 (1866); *Dow v. Town of Hinesburgh*, 2 Aik. 18, 1826 WL 1229 (Vt. 1826); *Van Vlieden v. Welles*, 6 Johns. 85 (N.Y.Sup.Ct. 1810); see *Smith v. First Principle Church*, 2011 WL 264318 (Cal.App. 6th Dist.).

[8] *Jenkins v. Trinity Evangelical Lutheran Church*, 356 Ill.App.3d 504, 510, 835 N.E.2d 1206, 1212, 292 Ill. Dec. 195, 201 (App.Ct.3d Dist. 2005)(citing cases); *Pendleton v. Waterloo Baptist Church*, 2 N.Y.S. 383 (Sup.Ct.5th Dep't 1888); *Bird v. St. Mark's Church of Waterloo*, 62 Iowa 567 (1883); *Jones v. Trustees of Congregation of Mount Zion*, 30 La. Ann. 711 (1878); *Miller v. Trustees of Baptist Church of Allowaystown*, 16 N.J.L. 251 (1837); *Riddle v. Stevens*, 2 Serg. & Rawle 537 (Pa. 1816), 1816 WL 1577; see *Vestry of St. Luke's Church v. Mathews*, 4 Des. 578, 4 S.C.Eq. 578 (S.C. 1815); *Combe v. Brazier*, 2 Des. 431, 2 S.C. 431, 1806 WL 366 (S.C.).

Courts gave several reasons for enforcing contract claims by ministers. They explained, first, that ministers had the same right as anyone else to judicial enforcement of their legal rights.

> [F]rom the nature of the contract, ... [the plaintiff] had a right to insist upon being retained as a minister of this church, until [the end of the period contracted for], unless he lost that right by some fault of his own; and ... there can be no legal distinction between a contract with a minister and his congregation, and any other civil contract for personal service.

Congregation of Children of Israel v. Peres, 42 Tenn. 620, 622 (1866).[9]

> The right to the salary stipulated at the time the plaintiff accepted the position of rector, is a valuable property right secured to the plaintiff by contract.... The civil courts will not revise decisions of churches or religious associations upon ecclesiastical matters, but they will interfere with such associations when rights of property or civil rights are involved.

Bird v. St. Mark's Church of Waterloo, 62 Iowa 567, 17 N.W. 747, 750 (1883).

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[9] *Runkel v. Winemuller*, 4 H. & McH. 429, 1799 WL 422 at *14 (Md.Gen.Ct.); see *Worrell v. First Presbyterian Church of Millstone*, 23 N.J.Eq. 96, 1872 WL 6871 at *1 (N.J.Chanc. 1872).

Second, the courts insisted that religious organizations were subject to the same secular obligations as others. "[R]eligious societies are left at liberty to make such contract, ... as shall be agreed between them and their minister; but the contract once made, it is subject to all such rules of law as govern other engagements." *Avery v. Inhabitants of Tyringham*, 3 Mass. 160, 169 (Parker,J.)(1807).

> The salary of the minister ariseth wholly from the contract which the people make with him. These contracts are altogether voluntary; but ... are considered as being of equal force and obligation as any other contracts....

Williams v. Town of North Hero, 46 Vt. 301, 317 (1873).

Third, courts noted that religious organizations themselves could sue ministers, and reasoned that it would be inequitable if ministers themselves could not bring such suits. In *Avery v. Inhabitants of Tyringham*, Chief Judge Parsons explained that an improperly dismissed minister should be permitted to seek redress in court because the parish itself, if a minister broke his contract without justification, could obtain damages from the former minister. 3 Mass. at 180.

Fourth, courts expressed concern that ministers would be deterred from meeting their responsibilities if they were subject to improper dismissal without recourse in the courts.

> If these contracts are merely at the will and pleasure of the parties ... on the part of the minister, must not a consciousness of dependence on the mere pleasure of the people affect that firmness of mind which is essential to an impartial and effectual reproof of vice and immorality?

Avery v. Inhabitants of Tyringham, 3 Mass. at 176 (Sedgwick, J.); see *id.* at 177 (Parsons, C.J.). Courts saw no conflict between contract claims and the right of religious organizations, guaranteed by several state constitutions, to select their own ministers. *Avery v. Inhabitants of Tyringham*, 3 Mass. at 169-70 (Parker, J.); *id.* at 172-74 (Sedgwick, J.); see *id.* at 179-80 (rejecting argument that Massachusetts constitution gave parish a right to dismiss minister)(Parsons, C.J.).

There were also numerous cases in which religious organizations sought redress from secular courts in employment disputes regarding ministers. A substantial portion of these involved a disputed dismissal, the religious organization seeking a court order to enjoin a previously appointed minister from continuing to hold services or engage in other functions.[10] These lawsuits necessarily turned at least in

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[10] *Williams v. Wilder*, 397 S.W.2d 696 (Kansas City Ct.App. 1965); *Grosse v. Beideman*, 239 Md. 283, 211 A.2d 298 (Md.Ct.App. 1965); *Evans v. Criss*, 39 Misc.2d 314, 240 N.Y.S.2d 517 (Sup.Ct.Bronx Cty. 1963); *Rush v. Yancy*, 233 Ark. 883, 349 S.W.2d 337 (Ark. 1961); *Bentley v. Shanks*, 48 Tenn.App. 512, 348 S.W.2d 900 (Tenn.Ct.App. 1960); *Rector, Churchwardens and Vestrymen of Church of Holy Trinity v. Melish*, 3 N.Y.2d 476, 146

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part on the legality of the defendant's termination, and a decision in favor of the minister-defendant overturned the purported dismissal and confirmed his right to remain in the pulpit.[11] In defending the propriety of these lawsuits, it was the religious organizations themselves which invoked the principle that secular courts could resolve disputes about ministerial appointments and dismissals. *Williams v. Wilder*, 397 S.W.2d 696, 703 (Kansas City Ct.App. 1965). In other instances individuals appointed as ministers by higher ranking authorities[12] sought injunctions to compel officials at a particular church to accept their appointment; these disputes at times resolved issues concerning which officials, under which circumstances and procedures, were empowered to

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N.E.2d 685, 168 N.Y.S.2d 952 (1957); *Providence Baptist Church of San Francisco v. Superior Court*, 40 Cal.2d 55, 251 P.2d 10 (1953); *Longmeyer v. Payne*, 205 S.W.2d 263 (Ct.App. Mo. 1947); *Evangelical Lutheran St. Paul's Congregation v. Hass*, 177 Wis. 23, 187 N.W. 677 (1922); *Prickett v. Wells*, 117 Mo. 502, 24 S.W. 52 (1893); *Hatchett v. Mt. Pleasant Baptist Church*, 46 Ark. 291 (1885); see *Chatard v. O'Donovan*, 80 Ind. 20 (1881); *Vestry of St. Luke's Church v. Mathews*, 4 Des. 578, 4 S.C.Eq. 578 (S.C. 1815).

[11] *Evans v. Criss*, 39 Misc.2d 314, 240 N.Y.S.2d 517 (Sup.Ct.Bronx Cty. 1963) (action by church officials to enjoin defendant from acting as minister). The court entered judgment "in favor of defendant determining that he is still the minister of Sharon Baptist Church, Inc. and entitled to act and hold himself out as such." 39 Misc.2d at 320.

[12] *Whitecar v. Michenor*, 37 N.J.Eq. 6, 1883 WL 7944 (N.J.Ch.); *Feizel v. Trustees of First German Society of Methodist Episcopal Church of Wyandotte City*, 9 Kan. 592 (1872); *Brosius v. Reuter*, 1 H. & J. 551, 1805 WL 479 (Md.Gen.Ct.).

appoint (or dismiss) a minister. Some lawsuits by religious organizations involved both types of claims.[13]

Because of the frequency with which these various types of actions were heard by the lower courts, several Members of this Court participated in them while serving on a state court. In *Downes v. Bowdoin Square Baptist Soc.*, 21 N.E. 294, 296, 149 Mass. 135, 139 (1889), the decision for the Supreme Judicial Court of Massachusetts was written by Justice Oliver Wendell Holmes. In *Feizel v. Trustees of First German Soc. of Methodist Episcopal Church of Wyandotte City*, 9 Kan. 592 (1872), the decision for the Kansas Supreme Court was written by Justice David Brewer. Justice Chase was the Chief Judge of the Maryland General Court during the early phase of *Runkel v. Winemuller*, 4 H. & McH. 429, 1799 WL 422 (Md.Gen.Ct.).

B. Lower Courts Have Historically Resolved Employment-Related Claims Regarding Ministers If They Could Do So Based on Neutral Principles

For two centuries the lower courts have recognized that in some instances an employment claim

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[13] *Rector, Churchwardens and Vestrymen of Church of Holy Trinity v. Melish*, 3 N.Y.2d 476, 146 N.E.2d 685, 168 N.Y.S.2d 952 (1957); *Robertson v. Bullions*, 9 Barb. 64 (S.Ct.N.Y.Cty. 1850).

regarding a minister could turn on a theological dispute that secular courts were not competent to resolve. The lower courts have addressed that potential problem on a case-by-case basis.

In *Avery v. Inhabitants of Tyringham*, the defendants objected that "there is no jurisdiction competent to declare when the [minister's] office is forfeited, or when the contract may be dissolved." To the contrary, Chief Justice Parsons insisted, secular courts could resolve such a case. If a minister were dismissed because he assertedly neglected his duties, and he

> sue[d] for his salary, the charges made ... , as creating a forfeiture, are questions of fact properly to be submitted to the jury. If they find the allegations true, the minister shall not be considered as holding his office after the vote of dismission. If the allegations are false, justice requires that he shall recover his salary. These allegations the jury are competent to inquire into, and on such inquiry ultimately to decide.

Id. at 181-82. On the other hand, the Chief Justice noted, if there were "objections to a minister founded on questions of doctrine," that would be resolved by "an ecclesiastical council mutually chosen." *Id.* at 182.

In *Burr v. Inhabitants of First Parish in Sandwich*, 9 Mass. 277 (1812), the Massachusetts Supreme Judicial Court concluded that the dispute that had given rise to the dismissal of the plaintiff minister was one that the courts could not resolve. In *Burr* the

parish had voted to fire the minister on the grounds that he no longer adhered to the religious views of the congregation, and "now preaches, and endeavors to support, doctrines totally different [from those he held when first hired], which the parish do not approve of or believe to be doctrines of the gospel." 9 Mass. at 289. At trial the judge "avoided any inquiry into the truth of the former [beliefs], or the present religious faith of the plaintiff," 9 Mass. at 290; the appellate court explained that "we should be at a loss to find legal principles on which to decide them." *Id.* "[A] court of law has no means of deciding on" "a difference [on the part of the parish] with their minister merely relating to points of doctrine." 9 Mass. at 298. "[D]isputes in theology" cannot "come into courts of law for decision, [because] the law has not furnished the jury with weapons of polemic divinity." *Id.*

Sheldon v. Congregational Parish in Easton, 24 Pick. 281, 41 Mass. 281 (1836), codified the previous caselaw regarding the types of cases a court would and would not resolve. The court held that a minister would forfeit his right to employment under a contract under three circumstances: "[a]n essential change of doctrine," "[a] willful neglect of duty," or "[i]mmoral or criminal conduct." *Id.* at 287. A secular court could resolve the second and third types of issues, but not the first.

> A clergyman, before he assumes the high duties of pastor, is bound fully and frankly to disclose his theological tenets, and impliedly undertakes to continue of the same faith and

> to preach the same doctrines. If he changes these, he ceases to perform one of the conditions of his settlement, and entitles the parish to dissolution of the contract.... But this subject is more peculiarly fit for the investigation of an ecclesiastical council....

Id.[14] Where the underlying dispute was one which a secular court was competent to resolve, the factual conclusions of the defendant religious organization itself were not controlling. *Congregation of Children of Israel v. Peres*, 42 Tenn. 620, 628-29 (1866).

This nineteenth century distinction has been followed in a number of more recent decisions, relying on the now-familiar constitutional principle that secular courts can resolve disputes related to religious organizations if it is possible to do so based on neutral principles. For example, in *Thibodeau v. American Baptist Churches of Connecticut*, 120 Conn.App. 666, 994 A.2d 212 (2010), the court held that

> employment disputes between clergy and religious institutions can be litigated in civil courts only if neutral principles of law can be allied without entanglement with religious considerations.... Courts, however, may not inquire into matters whose enforcement would

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[14] An ecclesiastical council was a group of ecclesiastical officials, generally agreed to and jointly selected by a disputing minister and religious organization, to assess the nature of their differences. Although the council's decision was not binding, its views would often constitute justification for a party with which it sided.

> require "a searching and therefore impermissible inquiry" into church doctrine. *Serbian Eastern Orthodox Diocese v. Milivojevich*, ... 426 U.S. at 723.
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> * * *
>
> The plaintiff ... contends ... that the defendant "blacklisted" him based on, inter alia, his theological perceptions. Resolution of this claim would involve an impermissible inquiry into the defendant's ... judgement regarding the qualification of clergy....

120 Conn.App. at 677, 992 A.2d at 221. *Drevlow v. Lutheran Church, Missouri Synod*, 991 F.2d 468 (8th Cir.1993) explained that

> [p]ersonnel decisions are protected from civil court interference where review by civil courts would require the courts to interpret and apply religious doctrine or ecclesiastical laws.... The First Amendment does not shield employment decisions made by religious organizations from civil court review, however, where the employment decisions do not implicate religious beliefs, procedures or law.... The Synod has not offered any religious explanation for its actions which might entangle the court in a religious controversy in violation of the First Amendment.

991 F.2d at 471-72.[15]

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[15] See *Mundie v. Christ United Church of Christ*, 987 A.2d 794, 799, 802 (Pa. Super. 2009); *Jenkins v. Trinity Evangelical*

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Applying this neutral principles approach, the lower courts have on a case-specific basis declined to decide actions which required determination of some theological issue. There have, however, been relatively few cases in which the defendant in fact justified its action in a manner that would have required the court to resolve some doctrinal issue. In administering the distinction, appellate courts have directed trial courts to carefully monitor the developing issues and discovery in a case, and authorized trial courts to end the litigation if it became apparent that the case would require determination of some theological issue which secular courts could not resolve. *Drevlow v. Lutheran Church, Missouri Synod*, 991 F.2d at 472. This case-specific neutral-principles approach to avoiding entanglement in theological questions remains the appropriate method of dealing with employment-related claims by employees of religious organizations.

Lutheran Church, 356 Ill.App.3d 504, 509-10, 835 N.E.2d 1206, 1211-12, 292 Ill.Dec. 195, 200-01 (App.Ct.3d Dist. 2005); *Providence Baptist Church of San Francisco v. Superior Court*, 40 Cal.2d 55, 60, 251 P.2d 10, 13 (1953); *Tendler v. Bais Knesses of New Hempstead*, 52 A.D.3d 500, 860 N.Y.S.2d 551 (App.Div.2d 2008); *St. Matthew Church of Christ Disciples of Christ, Inc. v. Creech*, 196 Misc.2d 843, 848, 768 N.Y.S.2d 11, 115 (Sup.Ct.Kings Cty. 2003); *Yates v. El Bethel Primitive Baptist Church*, 847 So.2d 311, 346 (Ala. 2002).

II. THE FIRST AMENDMENT RIGHT TO ENGAGE IN EXPRESSIVE ACTIVITY DOES NOT WARRANT THE CATEGORICAL EXCLUSION OF ENTIRE CATEGORIES OF EMPLOYEES FROM THE PROTECTIONS OF EMPLOYMENT LAWS

A. The Protection of Expressive Activity Recognized In *Boy Scouts of America v. Dale* Is Limited To Cases In Which A Defendant Demonstrates That Employment of A Particular Individual Would In Fact Interfere With Its Expressive Activity

Organizations that engage in expressive activity, whether the expression is religious in nature or wholly secular, have a First Amendment interest (subject to certain limitations not relevant here) in refusing to employ, or accept as volunteers, individuals whose actions or circumstances would interfere with that expression. "Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express." *Boy Scouts of America, Inc. v. Dale*,. 530 U.S. 640, 648 (2000). Thus because the Catholic Church has long taught that only men may be ordained as priests,[16] the government could no

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[16] Catechism of the Catholic Church, part 1577, available at http://www.usccb.org/catechism/text/pt2sect2chpt3.shtml#vi

Apostolic Letter Ordinatio Sacerdotalis of John Paul II to the Bishops of the Catholic Church on Reserving Priestly Ordination to Men Alone (1994), available at http://www.vatican.va/holy_

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more require the Church to ordain women than it could require the Boy Scouts to accept Mr. Dale as a Scout leader.

Dale clearly requires that the organization asserting a constitutional objection to application of an anti-discrimination statute must demonstrate that continued employment of the particular worker in question would in fact obstruct its expressive activity. 530 U.S. at 650; see *id.* at 653. This Court necessarily rejected the defendant's argument in *Dale* – similar to the "ministerial exception" proposed by petitioner – that the First Amendment barred application of anti-discrimination laws to *all* adult leaders in Scouting.[17] *Dale* did not recognize a constitutionally mandated "Scoutmaster exception" barring all applications of state anti-discrimination statutes to the Boy Scouts; it held only that the state-mandated appointment of Mr. Dale as a Scoutmaster would "significantly burden the Boy Scouts' desire to not 'promote homosexual conduct....'" 530 U.S. at 653 (*quoting* Reply Brief for Petitioners).

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father/john_paul_ii/apost_letters/documents/hf_jp-ii_apl_22051994_ordinatio-sacerdotalis_en.html

Congregation for the Doctrine of the Faith, *Declaration Inter Insigniores on the Question of the Admission of Women to the Ministerial Priesthood* (1976), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19761015_inter-signiores_en.html

[17] Brief for Petitioners, *Boy Scouts of America v. Dale*, No. 99-699, at 34.

B. The Free Expression Rights of Religious Organizations Are No Greater than The Free Expression Rights of Secular Organizations

The claimant-specific rule in *Dale* applies to all organizations challenging the application of anti-discrimination laws as an interference with their expressive activity. The constitutionally protected right to engage in expressive activity is the same for every type of organization.

> In *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984), we observed that "implicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."

530 U.S. at 647.

Petitioner points out that the employees of a religious organization who formulate, interpret or teach its doctrines are of great importance to its expressive role. That is undoubtedly correct, but it is equally true of those who formulate, interpret or teach the doctrines of other, entirely secular organizations. When an organization – religious or secular – exists primarily for the purpose of advancing certain views or beliefs, those who articulate those ideas are of central significance. But that is no more true for employees of the Hosanna-Tabor church than it is, for example, for employees of the Boy Scouts, the Sierra Club, the Heritage Foundation, or the NAACP. The

free expression rights of religious organizations are not greater than the rights of groups such as the American Atheists or the Americans United for Separation of Church and State.

One amicus brief notes that teachers in a religious school "implement[ ] the school's religious viewpoints on right and wrong, ... obedience to authority, ... and behaviors that exhibit good and bad character as defined by faith ... [or] 'assist in the implementation of the philosophical policies of the school.'"[18] But teachers in any school, religious or secular, do many of the same things. The "School Philosophy" of the Quaker-affiliated Sidwell Friends School[19] stresses many of the same concerns as the "History and Philosophy" of the non-sectarian Georgetown Day School.[20] Of course, some parochial schools place greater emphasis on religious training and conformity than do others. But the First Amendment does not establish different constitutional rules depending on the beliefs and practices of particular denominations.

The expressive activities engaged in by employees whom religious organizations insist should be classified as "ministers" at times resemble the

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[18] Brief Amici Curiae of Professor Eugene Volokh, et al., 34 (*quoting Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 19 n.3 (1993)(Blackmun, J., dissenting)).

[19] Available at http://www.sidwell.edu/about_sfs/school-philosophy/index.aspx

[20] Available at http://www.gds/podium/default.aspx?t=123451

activities engaged in by employees of secular organizations. For example, petitioner argues that the "ministerial exception" should be applied to a "Communications Director" for a religious organization. (Pet. Br. 22)(citing *Alicea-Hernandez v. Catholic Bishop*, 320 F.3d 698, 702 (7th Cir.2003)). But that is the same type of expressive work engaged in by communications directors for secular groups,[21] by Madison Avenue advertising executives, and by K Street lobbyists.[22] A church music director should be within the "ministerial exception," petitioner insists, because he or she is "the primary human vessel through whom the church chose to spread its message in song." (Pet. Br. 21)(*quoting EEOC v. Roman Catholic Diocese of Raleigh, North Carolina*, 213 F.3d 795, 804 (4th Cir.2000)). But a choirmaster leading the

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[21] The court in *Alicea-Hernandez* explained the role of the Bishop's press secretary by reference to secular press secretaries.

> A press secretary, as is evident from observing various public officials and entities, is often the primary communications link to the general populace. The role of the press secretary is critical in message dissemination, and a church's message, of course, is of singular importance.

320 F.3d at 704.

[22] In *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328 (4th Cir.1997), one of the key responsibilities of the plaintiff had been "advocating to the United States government the enactment of public policies that are just, promote peace and protect the environment." 126 F.3d at 329. Employees of the Carnegie Endowment for Peace and the Sierra Club presumably engage in similar advocacy.

singing of Handel's *Messiah* or "Swing Low, Sweet Chariot," or a Cantor chanting "Kol Nidrei," enjoys no different constitutional status than a group of union officials singing "Solidarity Forever" or "Joe Hill."

To be sure, the modes of expression and substantive beliefs characteristic of religious organizations and meetings often differ from those of secular associations such as labor unions, political parties, environmental groups or civil rights organizations. But these are not differences of constitutional significance. Just as there is no categorical "exception" for employees of secular organizations that engage in expressive activity, so too there is no such categorical exception for any particular set of employees of religious organizations.

III. ADOPTION OF A CATEGORICAL "MINISTERIAL EXCEPTION" DOCTRINE WOULD LEAD TO A LARGE NUMBER OF DIFFICULT CONSTITUTIONAL QUESTIONS

Petitioner and its amici recognize that there are a large number of vexing constitutional issues which would have to be addressed if this Court were to adopt the proposed "ministerial exception." They urge the Court to take only the first step down that long and winding road, embracing in principle the existence of such a new, open-ended constitutional rule, and leaving to future generations of judges the task of figuring out what this all means. The more prudent

course, we urge, would be to decline to start down that road at all.

A. Is The Standard Defining "Important Ministerial Functions" Objective or Subjective?

Petitioner argues that a worker should be denoted a "minister" within the meaning of the proposed categorical rule if he or she engages in certain types of activities. (Pet. Br. 2, 13, 14, 16, 19, 21, 23, 26). The central issue posed by petitioner's function-based approach is whether an activity is deemed an "important religious function" should be governed by an objective standard, which the courts themselves would apply in determining whether the activity was religious in nature (and importantly so), or by a subjective standard, which would be governed by whether the defendant itself (for whatever theological reason) regarded the activity as religious in nature. Petitioner adopts both positions.

(1) Petitioner's Objective Standard

Petitioner describes its standard as delineating as covered activities responsibilities that "are objectively important functions in *any* religion." (Pet. Br. 22)(Emphasis added).

To implement this proposed objective standard, petitioner urges the Court to adopt a list of eight specific activities which would be deemed as a matter of law to be "objectively important religious functions."

(*Id.* at 38).[23] Elsewhere petitioner identifies three additional functions which it contends should be held to be objectively religious functions;[24] petitioner does not indicate whether these additional functions should be classified as objectively important. Petitioner does not suggest that these are exhaustive lists of the objectively religious functions or objectively important religious functions. Secular courts would apparently be tasked in future litigation with deciding what other activities are and are not objectively important religious functions.

A number of religious organizations emphatically denounce this proposed objective approach, arguing that secular courts have no ability to decide what functions are (and are not) religious in nature; indeed, they insist, it would be unconstitutional for the judiciary to attempt to do so. "[C]ourts are not

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[23] The eight listed factors are whether an employee (1) "taught religion classes" (Pet. Br. 37), (2) "led worship" (*id.* at 37), (3) "led prayer" (*id.* at 37)), (4) "took [students] to chapel" (*id.* at 37), (5) "planned ... the worship services.... chose liturgies, hymns, and Scripture readings" (*id.* at 37-38), (6) "delivered a message based on the Scriptural selections" (*id.* at 38), (7) "interpret[ed] [the church's] doctrines" (*id.* at 38), and (8) "was expected to, and did, integrate faith with the secular curriculum." (*Id.* at 37).

[24] The additional factors are whether an employee is (1) "expected to serve as a Christian role model" (Pet. Br. at 41), (2) "obligated ... to teach 'according to the Word of God and the confessional standards of the Evangelical Lutheran Church'" (*id.* at 40), and (3) required "to maintain Christian discipline in love." (*Id.* at 40).

competent to distinguish 'religious' tasks from 'secular' tasks, and they engage in impermissible entanglement when they attempt to do so." (Brief of the Rutherford Institute Amicus Curiae in Support of Petitioner, 16).[25]

(2) Petitioner's Subjective Standard

Elsewhere in its brief petitioner suggests that the employer itself is to decide which activities are important religious functions, and that the courts must ordinarily accept the employer's view of this issue. "The Church's religious understanding of Perich's job functions ... and of their importance to the Church's religious mission, is entitled to deference." (Pet. Br. 48). "The church asks only that secular courts not second-guess good-faith religious understandings of religious functions." (*Id.* at 49). Several amici also argue that the controlling question is whether the religious organization itself regards a task as religious. "[T]he critical issue is not the tasks the employee performs but the meaning or religious significance with which the church endows those tasks under its own doctrine or creed." (Brief of the Rutherford Institute Amicus Curiae in Support of Petitioner,

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[25] See Brief of Amici Curiae Muslim-American Public Affairs Council, 15; Brief of Amici Curiae Religious Organizations and Institutions in Support of Petitioner, 9; Brief of the Council for Christian Colleges and Universities as Amicus Curiae Supporting Petitioners, 2; Brief of Amici Curiae American Bible Society, et al., 12.

21).[26] They too urge the courts to generally accept as conclusive a defendant's position as to whether an employee meets the legal standard for the ministerial exception.[27]

Neither petitioner nor these amici, however, explain how a court is to ascertain whether a particular religious organization regards a specific job activity as an "important religious function." All repeatedly direct this Court to religious tracts and documents, insisting that these make clear to secular judges the theological views of the denomination involved. But most major religions have a large number of books and treatises expounding, and at times disagreeing about, the meaning of their sacred texts, and many centuries of debates about those issues. While in some instances it might seem clear to a judge that a denomination regarded a particular activity as an important religious function, discerning the denomination's position on other activities would at times be beyond the constitutional competence of a secular court.

The difficulty that the courts would face in determining the subjective views of a particular

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[26] Brief of Amici Curiae Muslim-American Public Affairs Council, 15.

[27] Brief Amici Curiae of Professor Eugene Volokh, et al., 29; Brief of the Rutherford Institute Amicus Curiae in Support of Petitioner, 24; Brief Amicus Curiae of Trinity Baptist Church of Jacksonville, Inc. in Support of Petitioner, 6; Brief of Amici Curiae American Bible Society, et al., 11.

denomination is well illustrated by the arguments in this case. Counsel for petitioner advises the Court that the Missouri Synod construes a passage in the New Testament to strongly disapprove of suits against fellow believers.

> The Synod has long taught that fellow believers generally should not sue one another in secular courts – and never over religious matters. Biblically, that teaching is rooted in 1 *Corinthians* 6:1-11, where the Apostle Paul denounced lawsuits between believers as scandalous. It is elaborated in Lutheran interpretations of that passage. [Commission on Theology and Church Relations, *1 Corinthians 6:1-11:] An Exegetical Study* [(1991)].

(Pet. Br. 54). But the *Exegetical Study*[28] cited by petitioner appears not to support counsel's construction of *Corinthians*.

> The legal system by which order is maintained is a gift of God not to be despised. It may be used properly for certain purposes.... When the legal system is used and when action is motivated by reasons other than [greed, anger, revenge, or the desire strictly to defend one's own rights], the use may not only be appropriate but may be of benefit to both Christian and non-Christian.[29]

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[28] The *Study* is available at http://www.lcms.org/Document.fdoc?src=lcm&id=415

[29] *Exegetical Study*, 16.

Indeed, the *Exegetical Study* looks with particular favor on the enforcement of anti-discrimination laws.

> [T]here are undoubtedly instances in which the Christian not only may but must utilize the secular court system. We cannot, for example, deny ... the fairer treatment of minorities and the less fortunate because of civil rights actions, discrimination cases and labor lawsuits. Because of this, both Christian and non-Christian have benefitted from our legal system.[30]

We express no position regarding the meaning of any passage in *Corinthians*, or about how the Synod interprets any portion of the Bible. But these assuredly are not matters which the federal or state courts should attempt to resolve, or regarding which the judiciary should simply accept the theological account proffered by counsel.

Several amici suggest, in the alternative, that the courts could and ought to inquire into the subjective good faith of a representation by a religious organization that a particular job activity involves an important religious function. One suggests that courts should decide "whether the organizations' representations ... are *bona fide* ... [or] merely a sham."[31] Another urges that the "[c]ourts are more than capable of identifying insincere and self-serving invocations of

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[30] *Exegetical Study*, 14.

[31] Brief of Amici Curiae American Bible Society, et al., 20-21.

ministerial status" by church officials.[32] To the contrary, this Court should avoid adopting a constitutional standard that would in every case require the courts to sit in judgment on the subjective good faith of representations made by religious organizations regarding the nature of their particular theological views.

B. Are "Religious Functions" Limited To Communicative Tasks?

Petitioner's description of the types of activities that would qualify as religious functions is consistently limited to expressive activity. E.g., Pet. Br. 21 ("Not just pastors of congregations, but also religion teachers may teach the tenets of faith, lead worship, and give spiritual advice"). A number of religious groups, on the other hand, reject such a view of the types of actions that would qualify for the "ministerial exception." They insist, rather, that any function undertaken for a religious purpose can render the actor a "minister," even if the activity itself has nothing to do with expounding (other than, perhaps, by example) some theological doctrine. The proper standard, they urge, is whether the actions were taken "by religious followers as an expression and exercise of their religious beliefs." (Brief of Amici Curiae American Bible Society, et al., 17). Thus, so

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[32] Brief of Amici Curiae Religious Organizations and Institutions in Support of Petitioner, 2.

long as such a religious motive is present, an individual can be within the "ministerial exception" if he or she "tak[es] care of widows and orphans" (*id.* at 13-14), "car[es] for the needy by providing meals and shelter" (*id.* at 29), or provides "skiing, horseback riding, swimming, opportunities to ... young people in a setting and in an activity that is wholesome." (*Id.* at 40).[33]

C. Are There Additional Relevant Factors Other Than An Employee's Job Functions?

Although petitioner's proposed standard apparently concerns only whether an employee performed "important religious functions," petitioner's brief identifies a number of other factors – distinct from the presence or absence of particular job functions – that it urges would make more likely (or, in their absence, less likely) a conclusion that the employee

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[33] See Brief of Amici Curiae Religious Organizations and Institutions in Support of Petitioner, 4-5 (a "religious organization's own self-understanding of" "the appropriate roles of a ministry of the church" can include "cleaning, nursing, farming, stocking shelves, making furniture, grading papers, writing newsletters"), 5 ("charitable works like teaching adult literacy classes, performing social work, and nursing can all be 'secular' activities, but the nun who takes vows of poverty and obedience and performs these services to live out the gospel in service to other is a 'minister' of the church – even though she is not ordained"; "mopping floors" and "cleaning sinks"), 6-7 ("[m]anaging a thrift shop," "[G]rowing grapes and selling wine," "playing an instrument").

falls within the "ministerial exception." Petitioner asks the Court to hold, for example, that application of the "ministerial exception" would be more appropriate if a teacher "developed a close, personal relationship with her students (Pet. Br. 41), something that might be true of any good elementary school teacher, or was required to be of a particular faith (here Christian), even though that was not the more specific denomination of the employer. Several amici suggest other non-performance criteria.[34] Neither petitioner nor amici explain how these factors are to be weighed with (or against) an employee's assertedly religious functions.

D. What Quantum of Ministerial Functions Renders An Employee A "Minister" For The Purposes of The "Ministerial Exception"?

Petitioner's standard requires that an employee's religious functions (together with the non-function factors?) be assessed both "qualitatively and quantitatively." (Pet. Br. 41; see Pet. Br. 38). Qualitatively a court is to assess the religious importance of the type of functions at issue; giving a sermon presumably outranks passing the collection plate. Quantitatively a court is to evaluate how often, and for how long,

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[34] Brief of the American Jewish Committee, et al., as Amicus Curiae in Support of Petitioner, 11; Brief of Amici Curiae Religious Organizations and Institutions in Support of Petitioner, 3, 18, 19.

those religious functions occurred. In the instant case, for example, petitioner argues that the religious instruction given by Perich "was substantial: forty-five minutes a day is nearly four hours a week." (Pet. Br. 41).

Petitioner insists that the facts of the instant case satisfy this proposed qualitative/quantitative analysis. But petitioner does not explain how a court would decide a case in which an employee's religious functions were less frequent (for example, a parochial school teacher who provided religious instruction only forty-five minutes a month, or a year) or less important (for example, a parochial school teacher whose only religious function was to escort the students to and from chapel).

A number of religious groups attack petitioner's ambiguous standard as too demanding. Rather than assess the amount or importance of religious functions, they insist, any religious function at all would render an employee a "minister" for purposes of the "ministerial exception."[35] While this standard has the value of simplicity, it would likely mean that the ministerial exception would apply to virtually every employee of a religious organization, particularly if

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[35] Brief Amici Curiae State of Michigan and Seven Other States, 2; Brief Amici Curiae of Professor Eugene Volokh, et al., 30, 36; Brief of the Rutherford Institute Amicus Curiae in Support of Petitioner, 24, 26; Amicus Curiae Brief of the National Jewish Commission on Law and Public Affairs, et al., 11, 14.

"religious function" encompassed any action taken by the employee for a religious purpose.

E. Are Individuals with an "Ecclesiastical Office" Ministers *Per Se*, and If So What Is An Ecclesiastical Office?

Wholly apart from its proposed function-based analysis, petitioner contends that the "ministerial exception" would apply "[i]n all but exceptional circumstances" to an employee who holds an "ecclesiastical office." (Pet. Br. 45). Petitioner sets out eleven factors to be considered by a court in determining whether an employee's position is ecclesiastical in nature.[36] Evaluation of a number of the proposed factors would require examining a church's official tracts or publications. (Pet. Br. 46-47). Petitioner contends that in

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[36] The factors are (1) whether church authors have labeled the position "ecclesiastical and sacred," (2) whether there is a theological explanation as to why this is an ecclesiastical office, (3) whether the position has been regarded as ecclesiastical for hundreds of years, (4) whether the occupant had been required to complete substantial theological training, (5) whether the individual was "chosen in a prayerful process by a vote of the congregation," (6) whether the employee had been hired "for an indefinite term," (7) whether the employee was "subject to the same disciplinary rules as the Church pastor," (8) whether the employee "could be dismissed only for cause and only by a supermajority of the congregation," (9) whether the employee was "held out to the Church ... as a commissioned minister," (10) whether the employee "claimed a housing allowance for ministers on her taxes," and (11) whether the employee had been "installed in office via ... a 'solemn and public act.'" (Pet. Br. 46-48).

this case all eleven factors were present; it offers no account of when a lesser number of factors would and would not be sufficient to demonstrate the existence of an ecclesiastical position. Even where the necessary combination of factors is shown, however, petitioner urges that a court would still determine whether the ecclesiastical position was really "a sham." (Pet. Br. 49, 50). None of the religious groups that have filed amicus briefs appear to endorse this rule.

F. Which Types of Employment-Related Claims Are and Are Not Barred By The "Ministerial Exception"?

The "ministerial exception" proposed by petitioner does not bar every dispute that relates in some fashion to the employment of a "minister." Rather, petitioner argues that the so-called "exception" applies only to some, but not all, minister-related claims. Petitioner offers a number of conflicting accounts of the types of claims which the proposed exception would preclude.

First, petitioner states that the "ministerial exception" applies only where either the claim "would require the government to resolve religious questions" or "*would* impose an unwanted minister on a church." (Pet. Br. 19, 32, 36-37)(emphasis added). The first clause merely restates the entanglement doctrine, and thus bars only claims that would be precluded even if there were no "ministerial exception."

Thus on this iteration the only new bar created by the proposed exception would be to claims that "would" require a church to reinstate, or hire, a "minister." That rule would be essentially a prohibition against a particular form of relief; it would not bar actions by "ministers" insofar as they sought other types of remedies.

Second, petitioner explains that "the ministerial exception ... is limited to disputes between employer and employee that *could* impose an unwanted minister on a church or would entangle the government in religious questions." (Pet. Br. 50)(emphasis added). This is somewhat broader than the first version, since a lawsuit which merely requested reinstatement "could" result in that remedy (putting aside petitioner's argument that such remedies are constitutionally impermissible). This iteration may be a pleading rule, barring lawsuits by ministers if the complaint asked for (or, perhaps, failed to expressly disclaim), reinstatement.

Third, petitioner states that the "ministerial exception" applies to cases "that would end in reinstatement or its financial equivalent in back and front pay, *or* would require the court to decide religious questions." (Pet Br. 14)(emphasis in original). Putting aside the second clause, which restates the entanglement doctrine, this proposed rule would be a broader limitation on remedies, barring not only reinstatement but "its financial equivalent in back or front pay." It would not preclude all claims by ministers, but would apparently permit compensatory,

punitive, or liquidated damages, as well as back pay that was not the "equivalent" of reinstatement (e.g., back pay arising out of a claim for salary discrimination or a violation of state minimum wage laws).

Fourth, and most broadly,[37] petitioner states that "[t]he ministerial exception bars lawsuit that interfere in the relationship between a religious organization and employees who perform religious functions – most obviously, lawsuits seeking ... to impose monetary liability for the selection of such employees." (Petition, 9). This formulation would bar the imposition of tort liability on a church because it "select[ed]" a known or suspected child molester to "perform religious functions," such as serving as the minister for a congregation, and would preclude fines for employing minors, in violation of federal or state child labor laws, to perform such functions. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

Some courts have gone even further, and held that the "ministerial exception" "applies without regard to the type of claims being brought." *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 703 (7th Cir.2003).

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[37] Petitioner also repeatedly asserts that a church has an absolute right to "control" the actions of "ministers." (Pet. Br. 13, 14, 20).

G. Other Unanswered Constitutional Questions

In addition to the problems discussed above, the amicus briefs in this case and the decisions in the lower courts identify a wide range of other novel constitutional issues that would have to be addressed if this Court were to adopt some form of the proposed "ministerial exception." Many of these are constitutional issues which – wholly aside from the dispute about the standard for determining who is a "minister" – have already divided the lower courts that have struggled to make sense of the proposed "ministerial exception."

Does the "ministerial exception" bar claims of sexual racial harassment of a "minister"?[38]

Does the "ministerial exception" bar claims of discrimination in compensation or claims of violations of state minimum wage laws?[39]

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[38] *Compare Bollard v. California Province of the Society of Jesus*, 196 F.3d 940 (9th Cir.1999)(sexual harassment claim not barred by exception), *with* 211 F.3d 1331 (Wardlaw, J., dissenting from denial of rehearing en banc).

[39] *Compare Mundie v. Christ United Church of Christ*, 987 A.2d 794, 798 (Pa. Super. 2009)(compensation claims not barred) and Brief of Justice and Freedom Fund as Amicus Curiae Supporting Petitioner, 19-20 (same) *with Alcazar v. Corporation of Catholic Archbishop of Seattle*, 627 F.3d 1288 (9th Cir.2010)(en banc)(compensation claims barred) and *Combs v. Central Texas Annual Conference of United Methodist Church*, 173 F.3d 343, 344-45 (5th Cir.1999)(claim regarding denial of pregnancy benefits barred).

Does the "ministerial exception" bar retaliation claims?[40]

Does the "ministerial exception" immunize a religious organization that uses threats of dismissal to tamper with a witness, influence a juror or affect how an employee votes?

Does the "ministerial exception" bar tort or workers' compensation claims?[41]

Does the "ministerial exception" bar contract claims?[42]

Does the "ministerial exception" bar claims of third parties, such as children molested by ministers

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[40] Brief of the American Jewish Committee, et al., 12 ("Court should reserve for another day" whether exception applies to retaliation claims).

[41] Brief Amici Curiae of Professor Eugene Volokh, et al., 32 (injury-based action permissible); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir.1985)(tort claims not barred); *Clapper v. Chesapeake Conference of Seventh-Day Adventists*, 1998 WL 904528 at *6 (4th Cir.)(tort claims barred); *Petruska v. Gannon University*, 462 F.3d 294, 300, 307, 309 (3d Cir.2006)(bar applies to negligent supervision claim but not to fraudulent misrepresentation claim).

[42] *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 950 (9th Cir.1999)(contract claim barred); *Rayburn*, 772 F.2d at 1171 (contract claim not barred); *Clapper v. Chesapeake Conference of Seventh-Day Adventists*, 1998 WL 904528 at *6 (4th Cir.)(contract claims barred); *Petruska v. Gannon University*, 462 F.3d 294, 310 (3d Cir.2006)(contract claims not barred).

whose danger to children was known to church officials?[43]

Does the "ministerial exception" apply to organizations other than churches?[44] If so, when is an organization sufficiently religious in nature to qualify for the "ministerial exception"?[45]

Can the courts, in applying the "ministerial exception," question whether a defendant's claim to being a religious organization is a "sham"?[46]

Can the "ministerial exception" be invoked by a for-profit organization?[47]

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[43] *Compare* Brief of the United States Conference of Catholic Bishops,2-3 ("the church has the right to choose those who perform religious functions without regard to secular standards") *with id.* 23 n.18 ("Whether and under what circumstances the church has a duty to third parties to protect them from harm caused by one of its employees is not before the Court"); *compare Malicki v. Doe*, 814 So.2d 347 (Fla. 2002) *with Doe v. Roman Catholic Diocese of St. Louis*, 311 S.W.2d 818, 824 (Mo.Ct.App. 2010).

[44] See *Thibodeau v. American Baptist Churches of Connecticut*, 120 Conn.App. 666, 994 A.2d 212 (2010)(defendant was organization that provided employment placement services); *Drevlow v. Lutheran Church, Missouri Synod*, 991 F.2d 468 (8th Cir.1993)(defendant prepared personal information file used by churches in hiring minsters).

[45] See *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299, 309 (4th Cir.2004).

[46] Brief of the Rutherford Institute Amicus Curiae in Support of Petitioner, 9 (no "ministerial exception" if "the church is a fake")(*quoting Schleicher v. Salvation Army*, 518 F.3d 472, 477-78 (7th Cir.2008)), 24 (same).

Does the "ministerial exception" mean that government investigation of employment-related claims by a "minister" is unconstitutional?[48]

Can the "ministerial exception" be invoked to bar a government agency from providing representation to an asserted "minister"?[49]

Does the "ministerial exception" apply to doctors and nurses working in a hospital affiliated with a religious organization?[50]

Does the "ministerial exception" bar claims by *all* teachers at parochial schools?[51]

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[47] Brief of Amici Curiae Religious Organizations and Institutions in Support of Petitioner, 20 n.5 ("the ministerial exception's applicability to ... for-profit institutions need not be settled to decide this case").

[48] *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 703 (7th Cir.2003)(mere investigation violates constitution); but see *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986).

[49] See *Gipe v. Superior Court*, 124 Cal.App. 3d 617, 177 Cal.Rptr. 590 (Ct.App.4th Dist. 1981).

[50] Brief of Amicus Curiae International Center for Law and Religion Studies at Brigham Young University in Support of Petitioner, 4, 24.

[51] Brief for International Mission Board of the Southern Baptist Convention, et al., 32 (all parochial school teachers within "ministerial exception"); *DeMarco v. Holy Cross High School*, 4 F.3d 166 (2d Cir.1993)(claims by parochial school teacher at issue not barred).

Can an employee be a "minister" (within the "ministerial exception") of a particular religious organization even though he or she is a member of some other denomination?[52]

Does the "ministerial exception" bar suits *against* the "minister"?[53]

What standard of proof must a plaintiff meet to defeat a "ministerial exception" defense?[54]

Does the "ministerial exception" prevent the federal government from denying entry into the United States to an alien who has been selected as a minister by a domestic organization?[55]

Is the "ministerial exception" a jurisdictional bar?[56]

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[52] Brief of the Rutherford Institute Amicus Curiae in Support of Petitioner, 22 ("employees ... need not even be of the same creed as the sponsoring parish").

[53] Amicus Curiae Brief of the National Jewish Commission on Law and Public Affairs, et al., 2 ("ministerial exception" applies to claims against ministers).

[54] Brief Amici Curiae of Professor Eugene Volokh, et al., 30, 38 (plaintiff must overcome presumption of "ministerial exception" with "clear and convincing" evidence).

[55] Brief of the United States Conference of Catholic Bishops, 15 ("church's right to select its ministers, free from state interference").

[56] Brief Amici Curiae of Professor Eugene Volokh, et al., 4 ("ministerial exception" is jurisdictional); Brief of the American Jewish Committee, et al. as Amici Curiae In Support of Petitioner, 23-25 ("ministerial exception" is not jurisdictional); *Hutchison v.*

(Continued on following page)

Is the "ministerial exception" subject to waiver and estoppel?[57]

The large number of vexing constitutional questions posed by the proposed "ministerial exception" weighs heavily against the adoption of such an ill-defined doctrine.

Thomas, 789 F.2d 392, 396 (6th Cir.1986)("ministerial exception" is jurisdictional).

[57] *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 227 (6th Cir.2007)(McKeague, J., concurring)(noting this is an "open question").

CONCLUSION

For the above reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

AMICUS CURIAE BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") FILED ON BEHALF OF THE ORTHODOX JEWISH ORGANIZATIONS AND RABBINICAL COURTS IN SUPPORT OF PETITIONER

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IN THE
Supreme Court of the United States

No. 10-553

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,
Respondents.

AMICUS CURIAE BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") FILED ON BEHALF OF ORTHODOX JEWISH ORGANIZATIONS AND RABBINICAL COURTS IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI[1]

[1] Pursuant to Supreme Court Rule 37.6, *Amici* certify that no counsel for a party authored this brief in whole or in part. No person or party other than the *Amici* or their counsel has made a monetary contribution to this brief's preparation or submission. All parties have consented to the filing of this amicus brief.

The *amici* are organizations that represent the Orthodox Jewish community of the United States, its educational institutions, and its rabbinical courts. They strongly believe that controversies between religious institutions and their present or former employees should be considered and determined by religious authorities applying the principles that govern the faith. The "ministerial exception" that is being defined in this case should, in the view of these *amici*, be applied broadly to withdraw from the jurisdiction of secular courts litigation that could and should be decided in accordance with religious guidelines by religious authorities. This principle extends beyond employment controversies with employees whose "primary duties" are religious. It includes all claims made by or against any employee whose duties relate in any manner to the religious doctrine or teaching of his or her employer, particularly if, as is true of Jewish institutions, a meaningful internal religious remedy is available to the plaintiff.

This *amicus* brief describes for the Court some relevant propositions of Jewish Law that affect the resolution of employment-related controversies involving Jewish religious institutions. Jewish Law directs Jewish institutions to resolve controversies with Jewish employees in rabbinical courts applying the rules of Jewish Law. Jewish employees who are committed to traditional observance of Jewish Law should also, with rare exceptions, bring their claims against Jewish religious institutions to a rabbinical court.

There are many standing rabbinical courts ("*Batei Din*") in the United States that are available to hear and determine civil disputes, including controversies between employees of Jewish institutions and their employers. Some of the leading rabbinical tribunals in the United States have joined this *amicus curiae* brief. In all States, the jurisdiction of Jewish religious tribunals is limited to cases in which both parties voluntarily submit their controversies to rabbinical arbitrators. Decisions of such rabbinical tribunals, if voluntarily chosen by both parties, have generally been respected and enforced under federal and state arbitration laws.

The "ministerial exception" as universally recognized by American courts bars litigation in secular courts of disputes between synagogues and their rabbis. As a result, parties to such controversies – at the core of the "ministerial exception" – must resort to the alternative avenue of dispute resolution that Jewish Law commands – the rabbinical courts. Controversies between other employees of Jewish religious institutions and their employers remain, however, in an uncertain state and whether they may proceed in secular courts depends on how broadly the "ministerial exception" is applied or on how committed both parties are to a resolution based on principles of Jewish Law.

Jewish communal institutions are much more likely to abide by the doctrines of Jewish Law than are individuals, whose choice of forum may be determined by their appraisal of the probability of a favorable outcome from a particular tribunal. As a practical matter, Jewish religious institutions

ordinarily have no real choice. They must invoke the authority of a rabbinical court and request the application of Jewish Law if they seek resolution of a controversy with a Jewish employee.

The application of the "ministerial exception" urged in this case by the petitioner will govern more cases than the "primary duties" test invoked by the court below. It will, therefore, accord greater reciprocity, fairness, and mutuality of obligation to parties in disputes between Jewish religious institutions and their employees. In such controversies the Jewish institutional party is, in nearly all circumstances, obliged by the rules of its faith to seek relief only in a religious tribunal. A private disputant should not be able to select a secular court or to prevent recourse to an available religious court by withholding consent to arbitration.

The *amici* also believe that petitioner's stance on the "ministerial exception" follows from the Establishment Clause's doctrine of non-interference with the internal affairs of religious institutions. Whether an employee's conduct has violated the religious institution's doctrines so that his or her continued employment or promotion is damaging should not be determined by a secular judge or by a jury. This is true regardless of the centrality of the employee's position in the institution's hierarchy. Courts should not be permitted to substitute their superficial understanding of religious doctrine for more learned evaluations by scholars committed to observance of religious precepts.

DESCRIPTION OF THE *AMICI*

The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of volunteer lawyers that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States. COLPA has filed *amicus* briefs in the Supreme Court of the United States in 28 cases since 1968.

Agudath Israel of America ("Agudath Israel"), founded in 1922, is a national grassroots Orthodox Jewish organization. Agudath Israel articulates and advances the position of the Orthodox Jewish community on a broad range of legal issues affecting religious rights and liberties in the United States.

National Council of Young Israel is a coordinating body for more than 300 Orthodox synagogue branches in the United States and Israel that is involved in matters of social and legal significance to the Orthodox Jewish community.

Agudas Harabonim of the United States and Canada is the oldest Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community. For many decades it has maintained a standing religious court which adjudicates disputes brought to it by members of the Orthodox Jewish faith.

Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 400 members that has, for many years, been involved in a variety of religious, social, and educational areas affecting Orthodox Jews. For several decades it has maintained a religious court for the adjudication and resolution of disputes brought to it by members of the Orthodox Jewish faith.

Torah Umesorah is the coordinating body for more than 600 Jewish Elementary and Secondary Day Schools across the United States and Canada.

Baltimore Bais Din is a religious court for settlement and resolution of disputes through arbitration according to Jewish law, including financial, domestic and other claims.

Beth Din of the Rabbinical Council of California (RCC) is the largest body of Orthodox Rabbis in the Western United States. Its members serve as pulpit Rabbis and heads of educational institutions. The RCC Beth Din provides Alternative Dispute Resolution in accordance with Torah law.

Boston Rabbinical Court of Justice serves the entire New England area in adjudicating religious laws and controversies and has done so since its inception in 1930.

Kehilla Bais Din of Los Angeles handles ecclesiastic matters such as marriage and divorce, personal status certification, and conversion. Financial disputes are addressed through mediation and formal Beth Din procedures.

Maysharim Bais Din of Lakewood serves the Jewish communities of New Jersey, arbitrates dispute resolution in business matters, torts and damages, and family law.

Bais Din Tzedek U'Mishpat of New York was established in 2005 and serves the Jewish communities of New York. Its rabbinical judges hear cases in business, family and interpersonal dispute resolution.

ARGUMENT

I.

JEWISH LAW PROVIDES A RELIGIOUS FORUM THAT JEWISH LITIGANTS SHOULD INVOKE FOR THE RESOLUTION OF EMPLOYMENT-RELATED CONTROVERSIES

A fundamental principle of the Jewish religious tradition is that any society – including a gentile community – must establish a judicial system to hear and decide civil controversies. Establishment of courts is deemed one of the basic seven commands that bind all Noahides – *i.e.*, non-Jews. Maimonides, Mishneh Torah, *Melachim UMilchamotehem* 9:1, 14. As for Jews subject to Jewish religious law, the Torah's command in Exodus (21:1) that "these are the ordinances that you shall place *before them*," has been rabbinically interpreted as directing that civil controversies between Jews be brought before Jewish courts applying Jewish Law. Babylonian Talmud, *Gittin* 88b; Maimonides, Mishneh Torah, *Sanhedrin* 26:7; Shulchan Aruch, *Choshen Mishpat*

26. *See* Quint, A Restatement of Rabbinic Civil Law, Vol. 1, pp. 174-182 (1990).

The institution known as "*Beth Din*" or rabbinic court dates back to the time of Moses, whose father-in-law Jethro advised him to appoint judges over thousands, hundreds, fifties, and tens, who would "judge the people at all times." Exodus 18:21-22. The *Beth Din* has been a fixture of Jewish communities throughout history for the past three millennia.

In the United States *Batei Din* (the plural of *Beth Din*) are currently available in many metropolitan centers to adjudicate civil disputes between Jewish litigants. Some have permanent rabbinically ordained judges who hear civil claims and either issue decisions or seek compromise and settlement of disputes. Others call on knowledgeable members of the Jewish community to serve in a judicial capacity. Jewish Law also authorizes the parties to a dispute to form their own panel of judges by a *zabla* process under which each party selects one judge and the two chosen judges agree on a third member of the panel.

There is, therefore, no barrier whatever in the United States to a rabbinic court's consideration and decision of an employment-related dispute between a Jewish religious institution and a Jewish employee. The *Beth Din* is an available forum that can hear and decide the controversy according to Jewish Law. It is also an accepted principle of Jewish Law that *dina de-malchuta dina* – that the secular law of the venue of the litigation may be taken into account by the Jewish religious court and will, in certain

circumstances, be deemed binding. *See* 5 Encyclopedia Judaica 663-669 (2d ed. 2007), and authorities there cited.

This is the proper and preferred means that Jewish tradition prescribes for the resolution of disputes between employees of Jewish institutions and their employers. Whether the litigation is initiated by the individual or by the institution, a *Beth Din* should be empowered to resolve it.

II.

COURTS IN THE UNITED STATES HAVE CONSISTENTLY ENFORCED DECISIONS OF *BATEI DIN* THAT SATISFY PROCEDURAL STANDARDS REGARDLESS OF WHICH SIDE PREVAILS

American courts have treated *Beth Din* decisions as rulings of arbitration panels and enforced them if they satisfied the procedural criteria governing arbitral determinations. *See, e.g., Lang v. Levi*, 16 A.3d 980, 985-991 (Md. Spec. App. 2011); *Glatzer v. Glatzer*, 905 N.Y.S.2d 607 (App. Div. 2d Dep't 2010); *Dial 800 v. Fesbinder*, 12 Cal. Rptr.3d 711, 721 (Cal. App. 2004); *Ghertner v. Solaimani*, 563 S.E.2d 878, 823-824 (Ga. App. 2002); *Elmora Hebrew Center, Inc. v. Fishman*, 570 A.2d 1297 (N.J. Sup. Ct. App. Div. 1990).

An employee of a Jewish religious institution would, under these precedents, be able to secure a judicially enforceable judgment against the religious institution by initiating and pursuing a *Beth Din*

proceeding. See *Brisman v. Hebrew Academy of Five Towns & Rockaway*, 895 N.Y.S.2d 482 (App. Div. 2d Dep't 2010); *Kingsbridge Center of Israel v. Turk*, 469 N.Y.S.2d 732 (App. Div. 1st Dep't 1983). In the *Brisman* case the Beth Din's award to the employee substantially exceeded any judgment the employee could have obtained in a New York State court. Nonetheless, the Appellate Division held that it lacked authority to revise the Beth Din's judgment. Applying the "ministerial exception" to foreclose jurisdiction over lawsuits brought by teachers or other personnel in religious schools would not deny relief to employees who have valid claims that they are prepared to assert in a forum that applies the religious doctrines of their employers.

III.

BOTH SIDES IN JEWISH EMPLOYMENT-RELATED DISPUTES SHOULD BE EQUALLY MOTIVATED TO PRESENT THEIR CLAIMS TO *BATEI DIN*

Because of the constraints of Jewish Law, religious institutions ordinarily have no real choice of forum if they wish to initiate a legal proceeding against a Jewish employee. They are required by the doctrines previously discussed to seek relief only in a religious tribunal. Their religious constituencies will not permit them to bypass this traditional Jewish avenue of dispute resolution.

This result follows irrespective of whether the employee's "primary duties" are religious in nature. If a Jewish religious school determines to discharge

a Jewish teacher of secular subjects because his or her teaching, conduct, or dress violates the school's standards, it must initiate a *Beth Din* proceeding to obtain legal validation for the discharge. The individual employee is not similarly constrained in his personal choice, and he or she may deny jurisdiction to a *Beth Din* by simply refusing to consent to arbitration.

Petitioner's understanding of the "ministerial exception" extends beyond the limited class of employees whose "primary duties" consist of religious instruction. By bringing a larger category of employees within the exception, this interpretation would balance the scales between both sides in Jewish institutions' employment-related disputes. If an individual employee of a Jewish religious institution whose duties relate in any manner – not just in "primary" fashion – to the institution's religious doctrine or teaching cannot secure relief from a court, both employer and employee would equally be obliged to submit their controversy to the internal dispute-resolution mechanism provided by Jewish Law and Jewish tradition. As a result substantially more disputes of this nature would be submitted to, and decided by, Jewish religious tribunals, thereby reducing the burden on the courts and the judicial process.

IV.

CONSTITUTIONAL CONSIDERATIONS PROHIBIT AN INQUIRY INTO "PRIMARY DUTIES"

The Solicitor General acknowledges that the "ministerial exception" is "constitutionally rooted." Brief for the Federal Respondent in Opposition, p. 11. The exception implements the Establishment Clause's instruction that American courts may not interfere in the internal affairs of religious institutions. Former Chief Judge Posner of the Seventh Circuit described the purpose of the exception – "to avoid judicial involvement in religious matters" – and has said that it "is better termed the 'internal affairs' doctrine." *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008).

If the "ministerial exception" applied only to those employees whose "primary duties" are religious, courts would be free to inquire deeply into the scope and importance of religious doctrine. That inquiry is prohibited by the constitutional bar against religious entanglement, evaluation, and oversight by the judiciary. The many reported judicial decisions involving the "ministerial exception" – canvassed in substantial detail in the pleadings filed by the parties and by *amici* at the petition for certiorari stage of this case – demonstrate how intrusive and judgmental of religious beliefs and religious practice courts can be if the exception is narrowly applied.

The Fourth Circuit's opinion in *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d

299 (4th Cir. 2004), which applied a "primary duties" test to an employee of a Jewish institution, illustrates this point. The Fourth Circuit correctly concluded that the particular plaintiff in that case – who was a *mashgiach* or inspector of his employer's adherence to Jewish dietary rules – came within the "ministerial exception." But in arriving at that conclusion, the court determined that "kosher food is an integral part of Judaism" (363 F.3d at 308), that the plaintiff "occupied a position that is central to the spiritual and pastoral mission of Judaism" (363 F.3d at 309), and that "in the Jewish faith, non-compliance with dietary laws is a sin" (*id.*). The court concluded that "Jews view their dietary laws as divine commandments, and compliance therewith is as important to the spiritual well-being of its adherents as music and song are to the mission of the Catholic church." 363 F.3d at 309.

Although we do not disagree with the court's observations in the *Shaliehsabou* case, we believe that the Constitution forbids courts from engaging in this kind of analysis and comparison of religious convictions. The constitutional principle that preserves the independence of religious faiths and institutions shields judgments based on religious convictions from review and oversight by secular courts.

A different court faced with the same record regarding his "primary duties" might have reached the opposite conclusion. Hence the *Shaliehsabou* case illustrates to these Jewish *amici* the dangers of permitting courts to decide whether a plaintiff's "primary duties" are religious. The "ministerial

exception" should apply whenever a plaintiff in such a case has any duties that relate in any manner to the religious doctrine or teaching of the employer's faith, particularly if the faith affords an internal process for evaluating the plaintiff's claim and providing a meaningful remedy.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Sixth Circuit should be reversed.

June 20, 2011

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AMICUS CURIAE BRIEF

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In The Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF AMICUS CURIAE OF PEOPLE FOR THE AMERICAN WAY FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED FOR REVIEW

Whether the anti-retaliation prohibition of the Americans with Disabilities Act (ADA) may be constitutionally applied to a religious association's retaliatory firing of a teacher of secular subjects in a commercially operated school, where the teacher also performs religious functions and is designated a commissioned minister.

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INTEREST OF AMICUS CURIAE[1]

People For the American Way Foundation is a nationwide, non-profit, non-partisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1981 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has hundreds of thousands of members and activists across the country. PFAWF is firmly committed to the principles of religious liberty and freedom of conscience protected by the Constitution and has frequently represented parties and filed amicus curiae briefs in cases involving the Establishment and the Free Exercise Clauses of the First Amendment. The resolution of this case is of extreme interest to our organization and its members.

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[1] No counsel of a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief and no person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. Parties have provided written consent, on file with the Court, to the filing of briefs in support of either, or neither party.

ARGUMENT

I. COURTS MUST BE ABLE TO DETERMINE WHETHER A RELIGIOUS JUSTIFICATION FOR AN EMPLOYMENT DECISION IS SIMPLY PRETEXT FOR A SECULAR DISCRIMINATORY PURPOSE

As originally created, the ministerial exception was a narrow exception to federal prohibitions against employment discrimination, intended to prohibit judicial review into substantive ecclesiastical matters involving a church and its minister. *See generally McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (establishing ministerial exception). But forty years of jurisprudence has resulted in religious organizations receiving seemingly absolute deference in contested employment decisions that involve neither substantive ecclesiastical matters nor ministers. *See, e.g., Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006) (applying the ministerial exception to bar a complaint against sex discrimination despite evidence of discrimination); *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698 (7th Cir. 2003) (Hispanic Communications Manager's claim of discrimination based on national origin). Because this high degree of deference given to religious organizations goes far beyond constitutional requirements, it: (1) allows religious employers to abuse the exception through the use of pretext and (2) strips employees of the opportunity to seek recourse for employment decisions based on criteria that Congress clearly intended to prohibit.

To rectify this unjustified expansion, this Court should limit the application of the ministerial

exception in situations where a plaintiff, who performs predominantly secular functions, can bring forth evidence that the religious justification was pretextual. Permitting courts to examine claims of pretext in limited situations would allow employees an opportunity to adjudicate statutorily-guaranteed rights, yet provide religious employers with an appropriate level of deference mandated by the First Amendment.

A. The ministerial exception is easily susceptible to abuse

Circuit courts use various tests to determine an employee's ministerial classification, resulting in a muddled answer as to when an employee should be deemed a minister. *See Petition for Writ of Certiorari, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, (No. 10-553) (discussing the various approaches to the ministerial exception). The prevailing trend is to classify employees based entirely on the religious institution's beliefs as to whether the employee is performing ministerial functions. *See, e.g., Skrzypczak v. Roman Catholic Diocese*, 611 F.3d 1238 (10th Cir. 2010) (holding that worker whose principal duties included purely administrative tasks was a minister because the church considered some of the worker's duties as involving responsibilities that furthered the core of the Diocese's spiritual mission); *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299 (4th Cir. 2004) (deferring to a Jewish organization's characterization of the religious role of an employee); *EEOC v. Roman Catholic Diocese*, 213 F.3d 795 (4th Cir. 2000) (holding that a music teacher at a Catholic cathedral was a "minister" because the position was

"important to the spiritual and pastoral mission of the church.").

However, a test that relies entirely on the employer's classification effectively relieves a religious employer of legal liability and is easily susceptible to abuse, as religious employers can simply classify all of their employees as ministerial. This situation is particularly problematic where, as in this case, the educational duties of certain ministers and non-ministers bear strong similarities, and where the religious beliefs of the institution forbid access to the secular courts. *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 772 (6th Cir. 2010). For when religious doctrine precludes the possibility of civil suit, complete deference to a religious employer's classification eliminates any legal recourse for employees who perform predominantly secular functions and are fired for a secular discriminatory purpose. Even if an employment regime is a sham, and the ministerial classification of employees a deception, a litigant would have no practical chance to prove this if courts are required to simply yield to the ministerial classification of the religious institution. *See Schleicher v. Salvation Army*, 518 F.3d 472, 478 (7th Cir. 2008) (discussing a rebuttable presumption of valid employment classifications by religious employers without considering a religious belief system that bars access to the courts).

Thus, subjective, highly deferential employment classification tests permit religious *pretext* to become a shield for unlawful employment decisions, something that Congress clearly intended to prohibit. *Franks v. Bowman Transp. Co.*, 424 U.S. 747,

763 (1976) ("We begin by repeating the observation of earlier decisions that in enacting Title VII of the Civil Rights Act of 1964 Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin.").

B. Permitting limited judicial inquiry into an employer's alleged use of pretext will not create excessive entanglement between government and religion

Though restrictive of a court's authority to dictate religious doctrine, the limits imposed by the Establishment Clause are not absolute. Where courts can evaluate a legal claim without resolving a theological question, threats of excessive entanglement cease to exist. A proximate cause analysis that hinges on whether religious pretext is present does not engage religious doctrine, and therefore does not cause entanglement between government and religion.

1. *The Establishment Clause does not create an impenetrable shield against government intervention*

As this Court has notably held, the Establishment Clause of the First Amendment forbids "excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971). Circuit courts have subsequently divided the notion of government entanglement into two differing categories: procedural and substantive. *Petruska*,

462 F.3d at 311. Procedural entanglement occurs where there is pervasive monitoring of religious organizations, but has become virtually obsolete since this Court has permitted extensive interaction between government and religious bodies. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203 (1997) (holding that unannounced monthly visits by public supervisors to parochial schools did not amount to excessive entanglement); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (upholding social service grants to religious organizations, even though the programs and material were subject to state reviews and the grantees were subject to periodic visits). In contrast, the Establishment Clause's ban against substantive entanglement prohibits the government from endorsing or dictating religious doctrine by deciding between competing religious views, and thus prevents courts from substituting their judgment for that of a religious institution. *Petruska*, 462 F.3d at 311. However, the ban against substantive entanglement has been improperly expanded to encompass more than its original purpose of prohibiting the government from answering religious questions and resolving doctrinal disputes.

Substantive entanglement originally barred the government from resolving religious questions and disputes so as to not risk interference with a church's core, spiritual functions. *Skrzypczak*, 611 F.3d at 1245. However, courts have transformed substantive entanglement into a seemingly impenetrable shield against which a church's religiously motivated and non-religiously motivated employment actions are equally protected from government intervention.

For example, when a church communications director filed claims of gender and race discrimination based on unequal treatment she received from the church, even though the treatment received was unrelated to her ability to communicate on behalf of the church, the case was dismissed because the court considered her position as ministerial. After designating her as a minister, the court refused to evaluate all claims, even those unrelated to her job performance, and held it is "not our role to determine whether the Church had a secular or religious reason for the alleged mistreatment . . . ." *Alicea-Hernandez*, 320 F.3d at 703; *see also Skrzypczak*, 611 F.3d at 1245 (citing *Alicea-Hernandez*, 320 F.3d at 703) (disallowing discrimination claims brought by an administrative worker, who had been employed ten years and received consistently positive performance reviews, because she performed some duties related to the church's spiritual function); *Clapper v. Chesapeake Conference of Seventh-Day Adventists*, 166 F.3d 1208 (4th Cir. 1998) (holding that a school teacher at a church-operated school could not bring discrimination claims unrelated to his teaching performance because examining the validity of the claims would cause excessive entanglement).

Thus, the ban against substantive entanglement, as it is presently interpreted, has often allowed churches to implement otherwise prohibited employment decisions by simply claiming that the decision is tied to some element of its religion. Employees wronged by such decisions are then prohibited from even attempting to adjudicate the matter and showing the pretextual reasons that led to their termination, solely because the church

invoked its religious affiliation in the course of its decision.

2. *Applying the McDonnell Douglas framework to evaluate allegedly pretextual decisions of religious employers does not create impermissible entanglement*

Allowing courts to evaluate the rationale for a contested employment decision through a proximate cause analysis would enable the courts to ferret out religious pretext without forcing courts to become impermissibly entangled in religious doctrine.

For nearly forty years, courts have successfully utilized the burden-shifting framework from *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), to analyze employment discrimination involving non-religious employers. *See also Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) ("[The *McDonnell Douglas* framework] is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination."). While the burden-shifting framework was originally created to analyze Title VII cases, it remains instructive in cases involving religious employers where courts are asked to examine pretext without substituting their own judgment for that of the employer.

Importantly, when applying the *McDonnell Douglas* framework, courts do not make judgments on the underlying employer policy, such as the *validity* of the tardiness policy, but rather, make judgments on the common sense *believability* of the

employer's proffered reasons, such as whether inconsistencies in the employer's reasoning raise an inference of pretext. *See, e.g., Keller v. Orix Credit Alliance*, 130 F.3d 1101, 1108–09 (3d Cir. 1997) ("To discredit the employer's proffered reason . . . . [P]laintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could rationally find them unworthy of credence."). Similarly, applying the *McDonnell Douglas* framework to religious employers would not create judicial judgments on the substance or validity of a religious employer's doctrine, but rather, on the believability of the employer's proffered reason in light of the available evidence.

Under the *McDonnell Douglas* framework, the burden of persuasion remains at all times on the employee. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The framework first requires employees to establish a prima facie case of discrimination before a court considers the issue of pretext. *Id.* at 802. A plaintiff's prima facie case does not constitute a factual finding of discrimination, but merely serves as proof of employer actions from which a court may infer discriminatory animus. *Furnco*, 438 U.S. at 580. If successfully shown, an employer is then responsible only for having to articulate a legitimate, nondiscriminatory reason for its actions. *McDonnell Douglas*, 411 U.S. at 802. This by no means requires that the employer prove the absence of discriminatory motive, *Board of Trustee of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978), but simply instructs them to present anything as rebuttal to the inference drawn from the

prima facie case. *See McDonnell Douglas*, 411 U.S. at 802. The inquiry then concludes with the affected employee being given "a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons . . . were in fact a coverup . . . ." *Id.* at 805.

Application of a *McDonnell Douglas*-like framework to review a religious employment dispute where religious pretext may be a factor would not enter into the realm of substantive entanglement. This Court has held that "routine regulatory interaction which involves no inquiries into religious doctrine, no delegation of state power to a religious body, and no detailed monitoring and close administrative contact between secular and religious bodies does not of itself violate the [Establishment Clause's] nonentanglement command." *Hernandez v. Comm'r*, 490 U.S. 680, 696–97 (1989) (citations omitted). Permitting an employee to rebut through the use of evidence a church's stated rationale on the grounds of religious pretext raises the sole question of whether the plaintiff was terminated for the actual religious justification asserted by the employer, or because of a secular discriminatory motive. *See DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 170–71 (2d Cir. 1993) (holding that a parochial-school teacher's ADEA claim could be adjudicated without fears of entanglement so long as the employee's claim is distinguishable from the religious reason the school provided). A court's answer to such an inquiry would necessarily be confined to an employee's direct or circumstantial evidence of pretext, and would not require examination of the religious doctrine of the employer. Therefore, such a limited scope of inquiry would not constitute an extensive or continuous

judicial intrusion into the functions of religious institutions, nor would the wisdom or reasonableness of the church's doctrine be evaluated.

C. The Free Exercise Clause does not bar judicial review of religious pretext

This Court has recognized that churches generally have the right to govern themselves autonomously and free from judicial reach. *McClure*, 460 F.2d at 559–60 (discussing line of church autonomy cases); *see also Serb. E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) (applying the church autonomy principles in a church personnel dispute). Based on this Court's church autonomy cases, the Fifth Circuit constructed the ministerial exception. *McClure*, 460 F.2d at 560. In analyzing the ministerial exception, however, it remains vital to note that these church autonomy cases did not mandate absolute deference to religious organizations. Rather, such precedent only permitted deference when a resolution would impose the court's judgment over the church's on matters of church governance, religious faith, or doctrine, not with regard to *all* employment decisions by a religious organization. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). *But see Bouldin v. Alexander*, 82 U.S. 131 (1872) (resolving an internal church dispute and overturning a church election). Thus, the right to church autonomy is not a bar to judicial review of religious pretext where a resolution would not require the court to resolve church doctrine.

The idea of church autonomy first emerged in *Watson v. Jones*, 80 U.S. 679 (1872), and was

subsequently rooted in constitutional principles. In *Watson*, this Court declined to resolve a property dispute—the use of the church's building—between two fighting sects of the church. Although the decision in *Watson* was based on the federal common law principle of implied consent and not on constitutional right, this Court explained that churches had the autonomy to govern themselves and courts should generally avoid religious controversies. *Watson*, 80 U.S. at 725. In *Kedroff*, this Court explicitly held that the church autonomy doctrine first articulated in *Watson* was in fact based in the Constitution. 344 U.S. at 116 (stating that *Watson*'s principles "have federal constitutional protection as a part of the free exercise of religion against state interference."). The articulated constitutional right extended to the right of religious organizations to "decide for themselves, free from state interference, *matters of church government* as well as those of *faith and doctrine*," *id.* at 116 (emphasis added), and provided the basis for the ministerial exception later utilized in *McClure*.

The original church autonomy cases dealt exclusively with church property disputes. Two subsequent cases have applied the church autonomy principles from *Watson* to disputes involving church personnel, but neither case expanded the constitutional right articulated in *Kedroff*. *Gonzalez v. Roman Catholic Archbishop of Manilla*, 280 U.S. 1 (1929); *Serbian East Orthodox Diocese*, 426 U.S. 696; *see also NLRB v. Catholic Bishop*, 440 U.S. 490 (1979) (doubting the constitutionality of imposing secular law on a church, but ultimately refusing to resolve the constitutional issue). In *Gonzalez*, the plaintiff sued to become a Catholic chaplain. The

Archbishop had objected because the Catholic Church required that chaplains attend seminary school, which the plaintiff had not. In *Serbian East Orthodox Diocese*, the plaintiff sued after he was removed from his position as presiding Bishop, and the Court was asked to resolve who was the true bishop of the church. By refusing to hear each of these cases, this Court declined to replace religious doctrine with secular law. Thus *Gonzalez* and *Serbian East Orthodox Diocese* stand only for the proposition that churches cannot be sued for their application or interpretation of their own ecclesiastical laws. *See Gonzalez*, 280 U.S. at 7–8; *Serbian East Orthodox Diocese*, 426 U.S. at 719.

Though this Court refused to resolve church doctrine in each of these cases, this Court has not gone so far as to mandate complete deference to religious organizations simply because an employment dispute involves a church. Instead, the church autonomy cases only protect the right of a church to decide matters of faith and doctrine without judicial interference. *McClure*'s holding was consistent with the church autonomy cases because in *McClure*, the Fifth Circuit's application of Title VII would have essentially replaced religious doctrine with secular law. 460 F.2d at 560 ("[A]pplication of the provisions of Title VII to the employment relationship . . . would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment."). However, in cases where the dispute includes violations of personal rights and not matters of faith or doctrine, nothing in the church autonomy cases require complete deference. *See, e.g.*, *Watson*, 80 U.S. at 728 ("In this country the full and

free right to entartain [sic] any religious belief, to practice any religious principle and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all."). This notion also extends to encompass cases where a church is engaged in conduct such as fraud or collusion. *Gonzalez*, 280 U.S. at 16 ("In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive.").

Thus, because the ministerial exception can only be as broad as mandated by the Constitution, and the constitutional right to church autonomy does not require complete deference in employment disputes involving a church, the ministerial exception does not preclude judicial inquiry regarding a religious justification for an employment decision. This is particularly true when an employee has demonstrated that the justification provided is unsupportable. In such situations, judicial inquiry is not only permitted, but critical. Where the employment claims fall outside the scope of a church's doctrine and within areas of established employment law, the ministerial exception ceases to protect religious employers and instead, hinders the injured employee's ability to exercise congressionally-granted rights.

D. Appropriate deference will be given to the subjective judgments of religious employers even if courts are allowed to inquire into pretext

Enabling courts to examine evidence of religious pretext would protect employees of religious institutions from discriminatory employment practices without hindering or subverting a church's selection of its ministers. Circuit courts have shown, much like their ability to examine pretext, that they are more than capable of giving appropriate deference to subjective employment decisions and not substituting their judgment for that of employers. *See Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 455 n.7 (2d Cir. 1999) (holding that an employer has the sole right to set its own criteria for promotion and evaluate a candidate's fitness for promotion under them); *Bina v. Providence Coll.*, 39 F.3d 21, 26 (1st Cir. 1994) (upholding that a court cannot substitute its own views of tenure qualifications for those of properly instituted authorities); *Kunda v. Muhlenberg Coll.*, 621 F.2d 532, 548 (3d Cir. 1980) (stating that subjective matters pertaining to educational promotions should be evaluated by education professionals and not judges). Circuit courts have shown such deference in both teacher tenure cases, where a lack of subjective and scholarly judgment pertaining to professional appointments caused courts to "operate with reticence and restraint," *Jiminez v. Mary Washington College*, 57 F.3d 369, 377 (4th Cir. 1995), and law firm partnership disputes, where a lack of objective criteria to measure particular skills considered by a firm in promotions caused courts to decline to review firm partner-

track decisions, *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509 (3d Cir. 1992).

Considering this history of consistent deference to employers, courts can be trusted to exhibit no less than the same level of deference to religious employers. Moreover, enabling a court to objectively evaluate the evidentiary chain of causation in an employment decision does not threaten church autonomy and actually involves less entanglement than is involved in the Primary Duties Test,[2] where a court is asked to evaluate the spiritual role of an individual within a particular faith community. *See Alicea-Hernandez*, 320 F.3d 698 (holding that the responsibilities of a Hispanic Communications Manager within a church's Hispanic community were ministerial); *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999) (holding that a church choirmaster's participation in religious rituals qualified her as a minister).

Courts will not entangle themselves with religion, nor infringe on a church's free exercise of religion, if they limit their analysis to objective evidence, wholly distinct from any examination of a church's theology. The objective evidence corroborating the rationale for the employment decision, and not a court's evaluation or judgment of the underlying substance of the employer's reasoning, will

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[2] The Primary Duties Test applies the ministerial exception where "the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship . . . ." *Rayburn v. Gen. Conference of Seventh-day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985).

determine the court's decision to side with the employee or abstain from ruling.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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August 9, 2011

AMICUS CURIAE BRIEF

No. 10-553

IN THE

Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICI CURIAE* RELIGIOUS ORGANIZATIONS AND INSTITUTIONS IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

Amici are religious organizations and institutions with hundreds of thousands of religious and lay employees. *Amici* advance their religious missions through both clergy and non-ordained employees charged with religious and ministerial responsibilities or other duties integral to *Amici*'s ministries, as well as through employees who have no ministerial functions.

Amici and their affiliated denominations operate or support, directly or indirectly, thousands of religious institutions such as schools and universities, hospitals and nursing homes, and social service providers. Such facilities both benefit the community at large, as well as *Amici*'s ministries. *Amici* therefore have a direct and substantial interest in the scope and application of the ministerial exception. *Amici*'s ability to structure their internal hierarchies, employment relationships, and the delivery of services are negatively affected by limits on what positions qualify for the ministerial exception.[2]

INTRODUCTION AND SUMMARY

The ministerial exception plays a crucial role in safeguarding the constitutionally protected autonomy of religious organizations. Without the ministerial exception, religious organizations would be inhibited

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[1] Pursuant to Rule 37.6, *amici* state that counsel for the parties did not author this brief in whole or in part, and no person or entity other than an *amicus* made any monetary contribution to the preparation or submission of this brief. Counsel for all parties have consented to the filing, and the letters of consent have been filed with the clerk.

[2] Individual *Amici* are described in the appendix.

in their religious missions. Religious practice in America is diverse, and the variety of religious beliefs about the role of ministers is threatened by mechanistic paradigms that apply the ministerial exception only to employment positions that non-adherents—including courts—interpret as religious in nature. As the decision below illustrates, a religious minister's position may not have immediate religious significance to a person outside the religion, and it may be declared secular and therefore not protected, regardless of the religious organization's sincere self-understanding of that ministerial office. Even when judicially-crafted tests reach the correct result, the specter of potential litigation—and the uncertainty of whether the next court will properly understand an organization's religious practices—looms large, undermining the independence of religious organizations' decisionmaking and chilling its free exercise of religion.

Religious organizations, including *Amici*, desire to create a fair work environment consistent with their doctrines and practices. A mechanistic approach to the ministerial exception, however, impinges upon religious organizations' constitutional rights by obstructing their autonomy to decide who serves as a minister of their faiths. These rights are fully protected only where courts give substantial deference to religious organizations' sincere self-understanding of ministerial duties. This deferential standard does not give religious organizations license to discriminate. Courts are more than capable of identifying insincere and self-serving invocations of ministerial status and, as a consequence, declining to give them any weight. To do so, courts can and should take account of the actual or constructive knowledge of a ministerial employee herself, the

manner in which a religious organization has held itself out to the public, and the institution's non-profit status.

In light of Petitioner's undisputedly sincere self-understanding of the ministerial nature of "called" teachers, the court of appeals should have concluded that the ministerial exception applies in this case. The decision below therefore should be reversed.

ARGUMENT

I. FAILURE TO RECOGNIZE THE VARIETY OF MINISTERIAL OFFICES CHILLS RELIGIOUS EXERCISE.

A. Religious Organizations Have Different Self-Understandings Of Who Holds Ministerial Office.

1. American religious life is inescapably diverse. The Pew Forum on Religion & Public Life identified 143 religions and categories of religions in the United States. See U.S. Religious Landscape Survey, *Religious Composition of the U.S.* (2007), *available at* http://religions.pewforum.org/pdf/affiliations-all-traditions.pdf. Surveying this fertile and varied religious landscape, the Pew Forum's resulting report called the United States "a very competitive religious marketplace." See *id.* According to the report, even the dominant religious category—Protestantism—is characterized by "significant internal diversity and fragmentation, encompassing hundreds of different denominations." *Id.*

The conception of a ministerial role varies greatly across faith traditions. Some positions—such as priests, bishops, pastors, elders, deacons, and the like—are unmistakably ministerial in nature. But different religions may understand other offices to be

similarly ministerial, even if those offices would appear to an outsider to be secular in nature. The fact of religious pluralism may make it difficult for outsiders to recognize the different ministerial offices that individual religious believers may hold within a church or other religious institution—particularly for religious groups that draw primarily from minority or foreign populations and are based on beliefs outside of mainstream American culture.

This issue is not limited to minor denominations. For example, while the Catholic Church has archetypal ministerial officers such as bishops and priests, a Catholic nun—albeit not ordained—particularly one who teaches canon law at a Catholic university, certainly carries on a religious ministry. See *EEOC* v. *Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996). The forms of ministry in the Presbyterian Church (U.S.A.) similarly "may emphasize special tasks and skills and the ordering of the offices of ministry . . . reflect [that] variety," including ministries that are "primarily educational, administrative, legislative, or judicial." *The Constitution of the Presbyterian Church (U.S.A.)*, Pt. II: Book of Order G-6.0104, (2009-2011) ("Variety of Forms"). And, in this case, a congregation that is a member of the Lutheran Church–Missouri Synod employed a "called" teacher, an office freighted with that Church's longstanding theological understanding of the sacred, pastoral role played by persons in that position. See Pet. Br. 4-6.

2. Adding to this complexity is the diversity of functions and activities that different religions assign to their ministers. Some ministers perform obviously religious functions, but some also have roles or responsibilities that may be outside a non-adherent's understanding of the appropriate roles of a ministry

of the church. Examining a particular function or activity—be it cleaning, nursing, farming, stocking shelves, making furniture, grading papers, writing newsletters—in isolation from the religious organization's own self-understanding of that role can be misleading.

A purely mechanistic review of an employee's "secular" and "ministerial" functions cannot yield consistently accurate results, especially when a particular function may be the responsibility of a ministerial employee in one religious organization and a non-ministerial employee in another, depending in part on the theological tenets of each religious group. The centuries of conflict over the theological importance of good works versus faith alone is certainly an indication that these differences in the conception of a particular function can be a defining issue for different denominations.

For example, charitable works like teaching adult literacy classes, performing social work, and nursing can all be "secular" activities, but the nun who takes vows of poverty and obedience and performs these services to live out the gospel in service to others is a "minister" of the church—even though she is not ordained. See, *e.g.*, Congregation of Sisters of St. Agnes, http://www.csasisters.org/ministries.cfm; The Catholic Directory (2011), *Ministries, available at* http://www.thecatholicdirectory.com/ (last visited June 17, 2011) (providing contact information for Catholic hospitals, schools, nursing homes, counselors, literacy program, etc.). Similarly, mopping floors and cleaning sinks may appear to be wholly secular activities, but a Catholic seminarian might perform those duties as part of his vow of poverty and as an act of humility, self-abnegation and

service. See, *e.g.*, *Alcazar* v. *Corp. of Catholic Archbishop*, 598 F.3d 668, 675 (9th Cir. 2010).

Indeed, ministers routinely engage in apparently "secular" activities that unquestionably serve a religious purpose:

- Secular courts may see teaching a foreign language in an after-school program as a secular activity; yet when a Jewish Temple runs the after-school program for avowedly religious purposes and the only foreign language offered is Hebrew, the teacher engages in ministerial activity. See *Temple Emanuel of Newton* v. *Massachusetts Comm'n Against Discrimination*, No. 09-1950, 2009 Mass. Super. LEXIS 137, at *15-16 (Mass. Super. Ct. June 2, 2009).

- A resident in a pastoral clinical education program in a religious hospital operated "in accordance with the Social Principles of The United Methodist Church" engages in religious ministry that includes offering comfort, compassion and guidance, much as a secular counselor or therapist might do. See *Hollins* v. *Methodist Healthcare, Inc.*, 474 F.3d 223, 224 (6th Cir. 2007) (internal quotation marks omitted); see also *Petruska* v. *Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006) (chaplain at a religious university).

- Managing a thrift shop is by no means an overtly religious activity, but an ordained Salvation Army officer who uses sales as an opportunity to witness hope, faith and redemption to patrons is a minister. See *Schleicher* v. *Salvation Army*, 518 F.3d 472 (7th Cir. 2008); see also Salvation Army,

2010 Annual Report 22 (2010), *available at* http://annualreport.salvationarmyusa.org/_pdf/2010_AnnualReport.pdf (last visited June 17, 2011) (listing 1,375 family stores managed by Salvation Army officers).

- Managerial and educational functions that are often performed by non-ministers may take on religious significance when they are part of a Buddhist minister's oversight of a department of education. See *Himaka* v. *Buddhist Churches of Am.*, 917 F. Supp. 698 (N.D. Cal. 1995).

- Growing grapes and selling wine are activities typical of commercial vintners, but these activities may also be performed by monks, quintessentially religious figures, for the benefit of their order. See *Schleicher*, 518 F.3d at 476-77.

Ordained ministers are not the only church employees who serve the mission of the institution through seemingly secular acts; non-clergy employees similarly participate in activities whose religious significance is deep—even if it is not immediately obvious to persons unfamiliar with the teachings of a particular church:

- Playing an instrument or directing a choir can be a quotidian secular activity, but such activities become centrally religious when they involve selecting the music for a religious organization, and an organist or choir director can have such a profound impact on worship that he or she could be a ministerial employee. See *Tomic* v. *Catholic Diocese*, 442 F.3d 1036, 1040 (7th Cir. 2006) (noting the Church obviously cares "whether

the words of the Gospel are set to Handel's *Messiah* or to "Three Blind Mice"'); see also *EEOC* v. *Roman Catholic Diocese*, 213 F.3d 795 (4th Cir. 2000); *Starkman* v. *Evans*, 198 F.3d 173 (5th Cir. 1999); *Assemany* v. *Archdiocese of Detroit*, 434 N.W.2d 233 (Mich. Ct. App. 1988).

- Meal preparation is an ordinarily secular function, but a lay "mashgiach" responsible for ensuring faithfulness to Jewish dietary law who prepares meals for residents of an Orthodox Jewish eldercare home is a "minister" who fulfills a religious role central to the religious institution's principles. *Shaliehsabou* v. *Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 301, 303 (4th Cir. 2004).

- A communications director is not manifestly a ministerial employee, but a lay employee can act as the very voice of a church in the community and be responsible for preserving the integrity of the church's message, thereby filling an essentially ministerial office. See *Alicea-Hernandez* v. *Catholic Bishop*, 320 F.3d 698, 704 (7th Cir. 2003).

Function divorced from doctrine is an inaccurate gauge of whether an employee is "ministerial," and the separation of function from faith creates an impermissible risk that a secular court will inform a religious institution that its minister is not really a minister. Cf. *Watson* v. *Jones*, 80 U.S. (13 Wall) 679, 726-32 (1871) ("[I]t . . . would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.").

But delving into the religious doctrine undergirding different functions is no solution to the challenge presented by the diversity of religious exercise in America: The First Amendment prohibits a secular court's evaluation of religious doctrine. See *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) ("It is well established . . . that courts should refrain from trolling through a[n] . . . institution's religious beliefs."). Such inquiry into religious employment disputes creates the potential for "substitut[ion]" of a secular court's judgment for a religious institution's and for "judicial rewriting of church law" in a manner inimical to the First Amendment. *Serbian E. Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 708-09, 719 (1976). Of particular concern, a secular court's evaluation of an employment decision that is deeply enmeshed with religious questions would create the opportunity for secular judges to "sanitize" church doctrine touching on the employment decision wherever that doctrine seems too anachronistic, too progressive, or otherwise unwise or unpleasant or disruptive to dominant social mores.

Even if inquiry by a secular court into how religious doctrine affects employees' actions were constitutionally permissible—which it is not—it would not be feasible without deference to the religion's own understanding of those actions. While a court could perhaps gain a certain degree of expertise in the doctrine and practices of a single religion or a small group of "mainstream" religions, it would be unreasonable to expect any court—much less a secular court of general jurisdiction—to gain the necessary expertise to understand the inner-workings of the myriad religious institutions in this country. And that lack of understanding could result

in situations in which outcomes of religious employment disputes could largely depend on the particular jurists' familiarity with (not to mention affinity for) the religion under judicial scrutiny.

B. Religious Exercise Is Hampered By Uncertainty About Whether The Law Will Respect A Religious Organization's Self-Understanding Of Its Ministerial Offices.

Whether an employee is "ministerial" is not self-evident. Which functions are religious and which persons performing them are ministers are themselves deeply religious questions bound up in religious doctrine. Courts must therefore be careful to respect religious organizations' authentic self-understanding of who qualifies as a minister of the faith, particularly when those religious institutions must make hard employment decisions about those ministers.

The autonomy to consider religious criteria in employment decisions without state interference is the seminal purpose of the "ministerial exception," which is, appropriately, also identified as the "internal affairs" or "church autonomy" doctrine. See, *e.g.*, *Schleicher*, 418 F.3d at 475; *Bryce* v. *Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655 (10th Cir. 2002). As Petitioner explains, the ministerial exception is firmly grounded in the First Amendment.[3] Indeed, the exception is ultimately rooted in the Magna Carta.[4]

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[3] Pet. Br. 19-37. The Free Exercise Clause protects the right of religious organizations "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *St. Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116

The very fact of secular review of religious employment decisions—even if infrequent—may profoundly disrupt religious freedom. Judicial determination of which employees qualify as ministers creates a guessing game for religious institutions that cannot know if an employee qualifies as a minister until after a case has been brought, litigation costs have been incurred, and the court has made a ruling. Cf. *Presiding Bishop* v. *Amos*, 483

(1952). A religious institution's freedom to arrange its own internal affairs is vital; to allow state involvement—the "active involvement of the sovereign in religious activity"—risks the impermissible establishment of religion. *Walz* v. *Tax Comm'n*, 397 U.S. 664, 668 (1970).

The ministerial exception is also independently required by the Speech Clause. Secular determination of the religious voice is irreconcilable with the First Amendment: if a religious institution is to "communicate its religious message," it must have the "right to select its voice," *Petruska*, 462 F.3d at 306—a voice that speaks not only in preaching and praying, but also in comforting, counseling, teaching, guiding, and singing. Indeed, if an organization has the right to select its members, *see Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 622 (1984), it surely has the right to determine who speaks on its behalf.

[4] The first provision of the Magna Carta confirms the right of religious organizations to elect their own ministers. *The Magna Carta* § 1 ("FIRST, THAT WE HAVE GRANTED TO GOD, and by this present charter have confirmed for us and our heirs in perpetuity, that the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired. That we wish this so to be observed, appears from the fact that of our own free will, before the outbreak of the present dispute between us and our barons, we granted and confirmed by charter *the freedom of the Church's elections—a right reckoned to be of the greatest necessity and importance to it* . . . .") (emphasis added). Henry VIII would later seize control of the appointment of clergy, resulting in the evils of government appointed clergy elaborated on in the Petitioner's brief. Pet. Br. 26-28.

U.S. 327, 336 (1987) ("[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious."). Because "[t]he line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission," this "[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission." *Id.*

Most religious organizations have neither the litigation budget nor the capacity to take on the risk of losing employment suits, and the compliance guessing game would have several deleterious effects. *First*, no longer would religious doctrine and mission alone form the basis for a religious institution's employment decision; such decisions would be colored by speculation as to the litigiousness of the candidate/employee and of the predilections of the relevant court. This impact could be profound, particularly given that adverse employment actions could include transfer out of a particular parish, suspension from ministry, ecclesiastical discipline, or even merely a change in title.

For example, a dynamic candidate for communications director who could revitalize the church's role in its community may no longer be a viable choice if that dynamism makes that candidate higher risk (*e.g.*, in terms of potential conflict with church members), and termination would be an untenable solution because of the risk of liability. The church would be constrained in whom it could feasibly consider for a position—and the mission of the church would be altered by that constraint.

As "[p]rolix laws chill speech" in violation of the First Amendment, *Citizens United* v. *FEC*, 130 S. Ct.

876, 889 (2010), broad and complex anti-discrimination laws and regulations chill religious belief and practice. And these laws are subject to a wide range of potential interpretations ranging from guidance from the EEOC to the welter of state and municipal anti-discrimination agencies, as well as state and municipal courts.

Second, a guessing game would make religious organizations wary of allowing certain employees to perform certain tasks for fear that a court might deem the tasks too secular. If only ordained clergy were to be protected under the ministerial exception, such a policy would create or reinforce a clergy-laity divide and potentially create a host of perverse incentives. Indeed, some religions do not officially ordain or license their ministers, and so any bright-line ordination test would only create other line-drawing problems.

Finally, and most insidiously, as a religious organization begins to "characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well," the religious organization's very "process of self-definition would be shaped in part by the prospects of litigation." *Amos*, 483 U.S. at 336, 343-44. "A case-by-case analysis for all activities therefore would both produce excessive government entanglement with religion and create the danger of chilling religious activity." *Id.* at 344.

In constantly anticipating what a secular judiciary would deem sufficiently "religious," a church may begin to narrow its own view of "religious" activity. When "hard-nose proselytizing" provides greater insulation from litigation than ministry-through-service, the service-oriented religion suffers. See

Univ. of Great Falls v. *NLRB*, 278 F.3d 1335, 1346 (D.C. Cir. 2002). This may itself be "a violation of the most basic command of the Establishment Clause—not to prefer some religions (and . . . some approaches to indoctrinating religion) to others." *Id.*

II. COURTS SHOULD GIVE SUBSTANTIAL DEFERENCE TO A RELIGIOUS ORGANIZATION'S SINCERE SELF-UNDERSTANDING OF ITS MINISTERIAL OFFICES.

1. Central to religious autonomy is the right of every religious organization to define its own doctrine and practice, including who may act as its ministers and what conduct has significance for the employment status of those ministers. See, *e.g.*, *Kedroff* v. *St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952) ("[Q]uestions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern."); *Bollard* v. *Cal. Province of Soc'y of Jesus*, 196 F.3d 940, 946 (9th Cir. 1999) ("A church's selection of its own clergy is [a] core matter of ecclesiastical self-governance with which the state may not constitutionally interfere."). For religious institutions to carry out their religious missions pursuant to their own beliefs and practices (as opposed to those of the judiciary), their constitutional freedoms must extend to internal employment decisions with respect to their ministry.

Although some religious beliefs and practices conflict with the aims of antidiscrimination laws, courts should not lose sight of the fact that the civil rights movement sprang in large part from the teachings of churches, and religious organizations continue to be at the forefront of fighting for various civil rights in the workplace in a manner consistent with their doctrines. Catholic social teaching, to take

another example, emphasizes the moral imperative of "adequate protection for the conditions of employment." John Paul II, *Centesimus Annus* § 34 (1991). But whether particular religious views are deemed retrograde, radical, disruptive, inspiring or prophetic, it is central to the ability of religions to preach these views through their own chosen speakers.

Religious organizations' internal employment policies and protections may in fact advance important social interests and norms equally, or indeed more aggressively, than antidiscrimination laws. But without the ministerial exception, those policies, however effective they may be, would be nullified simply because the religious organizations' approach to discrimination differs from that of a particular legislative or administrative body. In many cases, restrictions on the discretion of religious organizations to remove ministers for acts deemed inconsistent with religious teaching would in fact undermine antidiscrimination and other important social norms. For instance, the United States Conference of Catholic Bishops has promulgated authoritative norms governing the Catholic Church's response to allegations of sexual abuse of minors, which include "precautionary measures," such as withdrawing an accused priest from sacred ministry or any ecclesiastical office, based upon a preliminary investigation conducted in accordance with canon law. See U.S. Conference of Catholic Bishops, *Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons* ¶ 6 (2006), *available at* http://www.usccb.org/ocyp/charter.pdf. These precautionary measures can result in swift and harsh employment decisions that may not be consistent

with the human resources procedures of other secular organizations. See, *e.g.*, *Stepek* v. *Doe*, 910 N.E.2d 655, 657-60 (Ill. App. Ct. 2009) (involving the removal of a priest from all ministry based on "reasonable cause to suspect" alleged sexual abuse of former parishioners, despite priest's claim that he was falsely accused in retaliation for unrelated disputes with those former parishioners). The Catholic Church has nonetheless deemed it more important to err on the side of protecting its young adherents.

Accordingly, when reviewing the employment decisions of a religious institution, courts should generally give substantial deference to the religious group's sincere self-understanding of its ministerial offices. Such deference protects the religious organization's constitutional right to autonomy while eliminating the confusion created by more mechanistic tests. An analysis of a religious organization's reasons for an employment action taken with respect to a minister is likewise not permissible, as it tramples on the organization's constitutional rights of association and autonomy—its right to determine for itself what their ministers should believe and how their actions affect their representation of, and stewardship within, the religion.

2. Opponents of the ministerial exception likely will point to instances, whether real or hypothetical, of employment discrimination by religious organizations and argue that deference to religious organizations' self-definition of ministerial offices will encourage churches to manipulate the exception and will insulate discrimination from judicial review. But a deferential ministerial exception does not give churches license to discriminate as there is no need to extend the protections of the ministerial exception

where a religious organization does not have a sincere belief in the ministerial nature of the employment position in question. Courts have long determined questions of sincerity in similar contexts without engaging in the type of invasive religious assessment that violates the constitution. See, *e.g.*, *Clay* v. *United States*, 403 U.S. 698, 700 (1971) (per curiam) (conscientious objectors must, among other things, "show that this objection is sincere"); *Gillette* v. *United States*, 401 U.S. 437, 457 (1971) ("The truth of a belief is not open to question; rather, the question is whether the objector's beliefs are truly held.") (internal quotations marks omitted); *Founding Church of Scientology* v. *United States*, 409 F.2d 1146, 1160 (D.C. Cir. 1969) (finding it "might be possible to show that a self-proclaimed religion was merely a commercial enterprise").

Courts are able to assess sincerity in a non-invasive manner even when statutes prohibit considering whether a particular belief is central to a person's religion. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 725 n.13 (2005) (permitting prison officials to inquire about the sincerity of prisoner's professed religiosity even though "RLUIPA bars inquiry into whether a particular belief or practice is 'central' to a prisoner's religion"). Because deference should be given only to sincere beliefs about the ministerial office, courts will be able to smoke out those (likely rare) instances where an organization invokes the ministerial exception as a post-hoc justification for otherwise improper discriminatory conduct. See, *e.g.*, *Lawson v. Sec'y, Fla. Dep't of Corrs.*, No. 10-10619, 2011 U.S. App. LEXIS 10770, at *2-4 (11th Cir. May 25, 2011) (per curiam) (finding prisoner's asserted Jewish beliefs "not sincere" because he did not attend prayer services, rejected offer for work proscription on

Saturdays, and ate non-Kosher foods); *United States* v. *Quaintance*, 608 F.3d 717-18, 720-21, 723 n.6 (10th Cir. 2010) (finding asserted religious belief of founding members of the Church of Cognizance, "which teaches that marijuana is a deity and sacrament," were insincere, in part, because the drug user "began to justify his use in religious terms only after he had been arrested for marijuana possession").

Courts may properly consider three factors that ensure that the ministerial exception will be applied only to a religious organization's sincere self-understanding of its ministerial offices. *First*, courts can consider whether employees have actual knowledge that a religious organization believes a particular employment position is ministerial in nature. Such actual knowledge could arise in many ways, including from explicit notice to the employee. But considering that many churches are small and legally unsophisticated entities for whom formal notices would be impractical, implied-in-fact, constructive knowledge based on, for example, the history and tradition of the role should also be sufficient. Whenever a person is held out to the public as a minister, that fact should weigh heavily in the consideration of their status. And when an employee has knowledge of the ministerial nature of a particular office, there will be little doubt about the sincerity of the religious organization's self-understanding, and little chance that an organization has opportunistically characterized a position as ministerial for litigation purposes.

Second, courts may also consider the manner in which an organization has held itself out to the public. Religious organizations need not take extravagant steps to make clear that they are

religious, nor need they educate prospective employees about specific tenets of their beliefs. But where an organization consistently holds itself out as religious, that view should be accepted as evidence of an organization's sincerity in characterizing an employment position as ministerial. See *Universidad Central de Bayamon* v. *NLRB*, 793 F.2d 400, 400 (1st Cir. 1986) (en banc) (Breyer, J.) (concluding that a university is a religious organization for purposes of application of federal labor laws where it "holds itself out to students, faculty and community as a Catholic school"); *Great Falls*, 278 F.3d at 1344 ("Where a school, college, or university holds itself out publicly as a religious institution, 'we cannot doubt that [it] sincerely holds this view.'") (quoting *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 653 (2000)). Many bona fide religious organizations (*e.g.*, Azusa Pacific University) are not affiliated with a religious denomination, but are undeniably religious. See, *e.g.*, Azusa Pac. Univ., *About APU* (2011), http://www.apu.edu/about/. Although affiliation with a religious denomination rightfully creates a presumption that the organization is religious in nature, it should not be an absolute requirement. To conclude otherwise would result in these unaffiliated organizations being impermissibly penalized.

Third, courts may take into account the non-profit status of a religious organization as a further indication that the organization is religious in nature and sincerely considers certain positions ministerial. See *Quaintance*, 608 F.3d at 722 (finding insincerity, in part, because drug users considered themselves to be in the marijuana "business"). As this Court has noted, non-profit religious organizations have little motive to discriminate for business motives and do not implicate the same concerns as do commercial

institutions.[5] See *Amos*, 483 U.S. at 337 (dismissing Establishment Clause concerns because the cases "involve a nonprofit activity" rather than the speculative issue of "entering the commercial, profit-making world."); see also *Great Falls*, 278 F.3d at 1344 ("[I]t is hard to draw a line between the secular and religious activities of a religious organization. However, it is relatively straightforward to distinguish between a non-profit and a for-profit entity.") (citation omitted).

3. Taken together, these three considerations—knowledge of the employee, the openly religious nature of the employer, and the organization's non-profit status—all but exhaust an appropriate inquiry into the sincerity of a religious organization's self-understanding of its ministerial offices. Going any further would invite courts to substitute their own views of which religious practices are "approved" and which are not. See *Serbian E. Orthodox Diocese*, 426 U.S. at 708-09, 719; cf. *Universidad Central de Bayamon*, 793 F.2d at 402-03 (Breyer, J.) ("[W]e cannot avoid entanglement by creating new, finely spun judicial distinctions that will themselves require further court . . . 'entanglement' as they are administered."); *Hankins* v. *Lyght*, 441 F.3d 96, 117 (2d Cir. 2006) (Sotomayor, J., dissenting) ("Federal court entanglement in matters as fundamental as a religious institution's selection or dismissal of its spiritual leaders risks an unconstitutional trespass[] on the most spiritually intimate grounds of a religious community's existence.") (internal quotation marks omitted).

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[5] Some for-profit organizations might also be religious in nature and sincerely deem as ministerial certain employment positions, but the ministerial exception's applicability to such for-profit institutions need not be settled to decide this case.

Applying these considerations to the decision below, Petitioner Hosanna-Tabor's sincere self-understanding that Ms. Perich's position as a "called" teacher was ministerial should be given substantial deference. There is no dispute about the sincerity of Hosanna-Tabor's understanding that Perich held a ministerial position. "Hosanna-Tabor treated Perich like a minister and held her out to the world as such long before this litigation began." Pet. App. 52a; see also Pet. Br. 6. Perich knew that Hosanna-Tabor understood a "called" teacher to be a ministerial position, in part because of the requirement that she complete eight college-level theology courses and an oral examination by committee before being deemed eligible to serve as a "called" teacher. Pet. App. 3a, 33a; Perich Dep. 18-19. In fact, after her commissioning, Perich was recognized as a "Minister of Religion, Commissioned," Perich Dep. at 22-11, 22-14; Pet. App. 3a, 33a, and she claimed special tax treatment available for ministerial housing, Pet. App. 4a; Pet. Br. 6. Hosanna-Tabor also held itself out to the community and to Perich as a religious school that "integrate[d] faith into all subjects." Pet. App. 5a, 35a. And there is no dispute that Hosanna-Tabor is not a commercial enterprise.

Deferring to the church's distinction between lay and "called" teachers provides elegant and clear resolution to the issue faced by the court below. Applying a mechanistic test, the court below grappled with the inherent difficulty distinguishing between the similarity of many of the roles of lay and "called" teachers. See *EEOC* v. *Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 781 (6th Cir. 2010) ("Given the undisputed evidence that all teachers at Hosanna-Tabor were assigned the same duties, a finding that Perich is a 'ministerial'

employee would compel the conclusion that all teachers at the school—called, contract, Lutheran, and non-Lutheran—are similarly excluded"). By focusing on the sincerity with which Hosanna-Tabor understands, treats, and holds out to the world its "called" teachers, the approach outlined above highlights the difference between lay and "called" teachers that is most important to the religion and most relevant for the ministerial exception—that Perich was a commissioned minister whose role had sincere religious significance to that religious organization. Grounding the ministerial exception in religious organizations' sincere self-determinations of who acts as ministers thus avoids the entanglement and confusion of the circuit court's mechanical test.

On this record, a proper application of the ministerial exception requires deferring to Hosanna-Tabor's sincere self-understanding that Perich occupied a ministerial position for which employment decisions are not subject to judicial review.

CONCLUSION

For these reasons, and those stated by petitioner, the decision of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

Adventist Health System / West is a not-for-profit religious corporation, which operates healthcare facilities throughout California, Hawaii, Oregon, and Washington. The stated mission of Adventist Health is to share God's love by providing physical, mental and spiritual healing as part of the healthcare heritage of the Seventh-day Adventist Church. The system includes 17 hospitals with more than 2,500 beds, approximately 18,600 employees, numerous clinics and outpatient facilities, the largest system of rural health clinics in California with additional sites in Oregon and Washington, 14 home care agencies and four joint-venture retirement centers. As a faith-based, non-profit organization, Adventist Health is impacted by the scope of the ministerial exception.

The American Islamic Congress ("AIC") is a civil rights organization promoting tolerance and the exchange of ideas among Muslims and between other peoples. AIC combats negative perceptions of Muslims by advocating responsible leadership, dialogue, and interfaith understanding. As Muslim-Americans, thriving amidst America's open multicultural society and civil liberties, AIC promotes these same values for the global Muslim community. AIC advocates unequivocally for women's equality, free expression, and nonviolence—making no apologies for terrorism, which primarily claims Muslim lives. AIC joins this brief in support of the universal principles of freedom of religion and freedom of expression.

Church Communities International is an international communal movement of families and singles who seek to put into action Christ's command to love God and neighbor. Like the first Christians

described in Acts 2 and 4, members are called to a way of life in which all are of one heart and soul, no one possesses anything, and everything is shared in common. Most members live in rural communities of 200-300 people that function as small villages. After a discernment period, members take permanent vows of poverty and as part of the living proclamation of their faith, contribute to the upkeep of the community through daily work. No one is paid for their work as each community shares all property, and working together is an expression of the members' commitment to serve Jesus Christ and one another. For members, prayer is indivisible from work, work indivisible from prayer. Church Communities International joins the brief to express its concern that the ministerial exception should apply to all members of a religious order or church community, such as theirs, where there is no valid distinction between clergy and laity.

The Church State Council is the oldest public policy organization serving a southwest region devoted exclusively to issues of liberty of conscience and religion and the separation of church and state. The Council joins this brief to urge vigorous protection for the rights of religious organizations to determine who is a minister and therefore a representative of the faith.

The General Council on Finance and Administration of The United Methodist Church, Inc. ("GCFA") is an Illinois corporation having its primary place of business in Nashville, Tennessee. GCFA is the financial and administrative arm of The United Methodist Church. GCFA is also charged with protecting the legal interests and rights of The United Methodist Church. The United Methodist Church is a religious denomination with

approximately twelve million members worldwide. Through its various agencies, it performs mission work in over 150 countries. The United Methodist Church is one of the largest religious denominations in the United States. It has approximately 33,000 local churches and nearly eight million members in the United States.

The General Synod of the Reformed Church in America is the highest assembly and judicatory in the Reformed Church in America. The Reformed Church in America traces its history in North America to 1628, and as a result is the oldest protestant denomination in North America with a continuous history. Today, the Reformed Church in America includes approximately 300,000 people of many cultures across the North American continent. There are approximately 950 churches in the United States and Canada. These churches are assembled into 45 regional units (each called a classis), and the 45 classes are assembled into 8 regional units (each called a regional synod). The Book of Church Order of the Reformed Church in America provides that the General Synod exercises "a general superintendence over the interests and concerns of the whole church" and "an appellate supervisory power over the acts, proceedings, and decisions of the lower assemblies." The ability of the General Synod to bind or speak on behalf of the lower assemblies or judicatories is limited. Nevertheless, the Book of Church Order specifically grants to the General Synod the exclusive authority to determine denominational policy, and also designates the General Synod as the final judicatory for all judicial matters that are filed at the classis or regional synod levels. Between annual meetings of the General Synod the affairs of the Reformed Church in America are administered by the

General Synod's executive committee, called the General Synod Council of the Reformed Church in America ("GSC"). The GSC, as well as the regional synods, classes, and local churches in the Reformed Church in America, employ numerous individuals to carry out their work and witness. Some such employees are ordained to a particular ecclesiastical office; others are not. All, however, play a significant role in promoting the mission and vision of the church, and the work of each individual is often difficult to categorize as religious or secular. Accordingly, the issues addressed in this brief are of great interest and importance to the General Synod.

Loma Linda University is a Seventh-day Adventist educational health-sciences institution with more than 4,000 students located in Southern California. Eight schools comprise the University organization. More than 55 programs are offered by the schools of Allied Health Professions, Dentistry, Medicine, Nursing, Pharmacy, Public Health, Religion and Science and Technology. Curricula offered range from certificates of completion and associate in science degrees to doctor of philosophy and professional doctoral degrees. Loma Linda has an interest in ensuring religious liberty is not hampered by a narrow ministerial exception.

The Mandaean Society of America is a religious organization with more than five thousand members in the United States. The Mandaeans have recently chosen the United States as their new homeland after facing persecution in their original homelands in Iraq and Iran. The Mandaean religion is an ancient monotheistic belief system. The ethics of Mandaeans apply to all—man or woman, priest or layman—and reinforce the ideas of monogamy, family, pacifism, dietary laws, and alms-giving. Their rituals are

conducted in the Mandaean language; they have no symbols, idols, or images to which they pray. The Mandaeans have endured severe discrimination throughout their history and desire to see a robust protection for the freedom of religion, and particularly for the freedoms of religious minorities whose ethics and practices may not be well understood.

The Moravian Church in America consists of a Northern and Southern Province, two of the eighteen self-governing, semi-autonomous provinces which make up the world-wide Moravian *Unitas Fratrum*. The church's northern European origins actually predate the Protestant Reformation. The Moravian Church is broadly evangelical, ecumenical, liturgical, and "conferential" in form of government. Although not a true confessional church, the Moravian Church accepts the traditional creeds of the Christian Church and, in its practice, adheres to its motto: "In essentials, unity; in nonessentials, liberty; and in all things, love." Ecumenism is a particular emphasis of the church. In addition to membership in the World and National Councils of Churches and numerous other ecumenical organizations, both Provinces enjoy a relationship of full communion with the Episcopal Church and the Evangelical Lutheran Church in America. The promotion of social justice is another hallmark of the Church and Moravians cooperate with other churches and faith-based organizations in the support of mission, public charities and other Christian enterprises. The Moravian Church, Northern Province and the Moravian Church, Southern Province join in this amicus brief to help ensure that all religions enjoy the legal freedom to choose those who minister in the name of that faith.

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND CHERYL PERICH,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RELIGIOUS TRIBUNAL EXPERTS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

This case presents important questions about the coexistence of religious organizations' recognized interest in the establishment and management of their internal affairs and the employment rights and remedies that federal and state legislatures have enacted over the past several decades. Participating as *amici curiae* are current and former members of religious courts and other individuals expert in the work of such courts ("Religious Tribunal Experts"). Religious Tribunal Experts collectively have decades of experience with religious courts in The United Methodist Church, the Presbyterian Church (U.S.A.), the Roman Catholic Church, and the Jewish faith. A list of the Religious Tribunal Experts and their qualifications is set forth in the appendix hereto.

Amici Curiae Religious Tribunal Experts have several distinct and substantial interests in this case. ***First***, as active participants in their respective faith traditions, *amici curiae* have observed first-hand how religious institutions rely on religious courts, tribunals, and other forms of dispute resolution as integral parts of their faith missions. Religious Tribunal Experts recognize that members of the Court, like many members of the public at large, may not be familiar with these diverse tribunals, and therefore respectfully seek to inform the

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1. Pursuant to Supreme Court Rule 37.6, *amici curiae* and their counsel drafted this brief. No party or counsel for a party authored this brief in whole or in part. No person other than the *amici curiae* or their counsel made a monetary contribution to the brief's preparation or submission. All parties have consented to the filing of this brief and letters of consent have been lodged with the Clerk.

Court about the vital function that religious courts and tribunals serve.

Second, Religious Tribunal Experts, several of whom serve or have served on religious courts, recognize that this case may significantly alter the development of ecclesiastical law. Since the enactment of the various federal employment anti-discrimination laws beginning in the middle of the 20th century, the "ministerial exception" recognized by the lower courts has allowed religious courts to continue their work of deciding religious disputes—including certain employment disputes—without undue interference from civil courts. The case before the Court may impact whether and how religious courts will be able to carry out their important role in the faiths they represent.

Finally, Religious Tribunal Experts believe the case before the Court implicates fundamental First Amendment principles that may more broadly shape the interaction of government and religious organizations well into the future. They thus respectfully offer this brief in an attempt to make the function, procedures, and inner workings of religious tribunals more understandable to the Court, so that as it considers the issues raised by the parties, the Court can fully appreciate this case's implications.[2]

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2. *Amici Curiae* Religious Tribunal Experts each present their views based solely on their own personal knowledge and experience with their respective faith and not on behalf of the faith itself or any organization.

SUMMARY OF THE ARGUMENT

This Court has long recognized the vital role that ecclesiastical systems of government can play in the life of religious organizations. Over one hundred years ago, the Court stated that where a religious organization has established an ecclesiastical system of government, civil courts must respect and defer to decisions of the highest "church judicatories" that pass on "questions of discipline, or of faith, or ecclesiastical rule, custom, or law" "as final, and as binding." *Watson v. Jones*, 80 U.S. 679, 727 (13 Wall. 1871).

The issue in this case—the scope of the First Amendment's "ministerial exception"—implicates a specific component of many religious organizations' ecclesiastical systems of government: the religious court. The purpose of this brief is to assist the Court in understanding the work of these religious courts and the vital role they play in religious organizations in this country and around the world, so it can place the ministerial exception in its proper context as a critical safeguard for religious organizations' freedom and vitality.

Section I of this brief describes the religious court systems of several different religious organizations—The United Methodist Church, the Presbyterian Church (U.S.A.), the Roman Catholic Church, Judaism, and the Episcopal Church. As part of a long historical tradition, these and other religious organizations have committed ministerial employment decisions to the jurisdiction of a religious court, ecclesiastical tribunal, or other decisional body. These religious organizations have endowed their courts with authority to hear and resolve ministerial

employment disputes based on governing procedures, rules and principles, which are often quite formal and well-developed. Whether characterized by formal or informal processes, however, the work of these tribunals is imbued with the unique values and judgments of the belief systems they support and enforce.

Section II of this brief explains how the Court's decision on the ministerial exception will affect the First Amendment rights of the religious organizations that have established religious courts. The ministerial exception, generally speaking, bars civil lawsuits that interfere with or would superintend over the relationship between a religious organization and its employees who perform religious functions. The exception is a considered response to the sometimes uncomfortable relationship between internal religious administration and decisionmaking, on the one hand, and enforcement of various antidiscrimination laws on the other. Regardless of its precise doctrinal underpinnings, the exception was borne of several core considerations: concern about excessive judicial entanglement in internal church doctrine and religious questions, respect for the inherent authority of religious organizations to determine who carries out their mission, and the need for our civil legal system to provide breathing room for religious organizations to order themselves as they see fit.

A robust ministerial exception protects religious organizations' core First Amendment rights by preventing civil courts from second-guessing the true motivations of a religious organization's hiring, assignment, discipline and termination decisions, which are often made by religious tribunals. As the Fifth Circuit said in the seminal

case establishing the ministerial exception, the First Amendment recognizes that the "relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose." *McClure v. Salvation Army*, 460 F.2d 553, 558–59 (5th Cir. 1972).

As it evaluates the applicability of the ministerial exception in this case, the Court will provide guidance about how First Amendment principles interact with the federal and state interests embodied in the varied laws that otherwise would regulate the internal decisions of religious organizations. Any resolution of the scope of the ministerial exception must take account of and respect the vital role that religious courts play in resolving ministerial employment disputes for certain religious organizations. The tribunals described herein are, to the religious organizations they serve, a critical means of maintaining, protecting, and developing their core values by resolving questions about who serves as leaders, teachers, and representatives, and under what conditions. Through established procedures, legitimate authority, and the confidence of their faithful, these tribunals ensure fidelity to the organization's core values and doctrine.

ARGUMENT

I. Many Religious Organizations Have Sophisticated Religious Court Systems for Resolving Employment Questions

Many religious organizations maintain religious court systems to hear disputes affecting the management of the organization and the answer of doctrinal questions.

Although these court systems may be called upon to address any number of issues within their respective religious organizations, one major purpose of these tribunals is to hear and resolve matters concerning employees, such as priests, rabbis, and laity performing religious or internal functions. A typical use of such a court would be to resolve questions over whether a particular employee's actions are consistent with the beliefs of the religious organization. Conflicts between civil legal systems and the jurisdiction of ecclesiastical tribunals can arise when an employee subject to a disciplinary or personnel decision of a religious tribunal asserts that the tribunal's decision is pretextual or is invalid under civil laws or standards. Indeed, it is not hard to hypothesize all manner of disagreements related to religious personnel's selection, hiring, training, assignments, and discipline that could be alleged to implicate various federal and state employment rights, but which would necessarily involve civil courts' superintendence over internal and doctrinal matters.

Religious court systems can be quite varied. This brief describes a few of these systems to give the Court a deeper understanding of their operations and of their importance to their respective faiths. These systems generally share certain primary characteristics, including discernable substantive standards and procedural rights, which are grounded in the religious organization's core values and doctrine. Whether termed "fair process" in The United Methodist Church's tradition, or "due process" in the Presbyterian Church (U.S.A.)'s tradition, many religious organizations share a stated commitment to evenhandedness and strive to ensure that the religious organization is not unfairly favored in the crafting and

execution of the process. Whatever their particular attributes, these tribunals form an integral part of the organization's structure and operations; they embody the unique values of the faiths they represent and offer procedures consonant with those values, about which the organization's community have knowledge and on which, in many cases, the laity have substantial input.

A. The United Methodist Church

The United Methodist Church ("UMC"), which traces its roots to church bodies in the 18th century, has fashioned an extensive system of internal governance founded on its belief that "[t]he church is a community of all true believers under the Lordship of Christ" which "seeks to provide for the maintenance of worship, the edification of believers, and the redemption of the world."[3] In addition to five jurisdictional conferences within the United States, the UMC performs mission work in over 150 countries, with seven central conferences in Africa, Central and Southern Europe, Congo, Germany, Northern Europe, the Philippines, and West Africa.[4] The UMC has a formal judicial system,[5] which has authority to investigate and resolve complaints against ministers

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3. The United Methodist Church, *The Book of Discipline of The United Methodist Church* (The United Methodist Publishing House 2008) ("Book of Discipline"), Part I, The Constitution, Preamble, *available at* http://www.nyac.com/pages/detail/1755.

4. *See* The United Methodist Church, Structure and Organization: Organization, *available at* http://www.umc.org/site/c.lwL4KnN1LtH/b.1720697/k.734E/Structure__Organization_Organization.htm.

5. Book of Discipline, Part I, The Constitution, ¶ 58.

that involve one or more of a list of serious "chargeable" offenses.[6] The Judicial Council, which is the church's ultimate appellate body,[7] has issued over 1,100 decisions addressing diverse ecclesiastical issues within the UMC,[8] including ministerial employment matters.[9]

The UMC views ordination as a "sacred trust," and therefore a minister accused of violating this trust is subject to review and, potentially, administrative or judicial

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6. *Id.*, Part V, Ch. 7, ¶ 2702 (chargeable offenses include "disobedience to the order and discipline of [the UMC]" and "dissemination of doctrines contrary to the established standards of doctrine of [the UMC]").

7. *Id.*, Part I, The Constitution, ¶ 55 ("There shall be a Judicial Council."); *id.*, ¶ 56 (Judicial Council's authority).

8. *See* http://archives.umc.org/interior_judicial.asp?mid =263 (links to 1,189 published decisions by the Judicial Council).

9. *See, e.g., In re: Appeal of Wesley Kendall*, Decision 1094 (UMC Judicial Council, Apr. 29, 2008) (affirming revocation of minister's ordination credentials after conviction on charges of sexual misconduct and disobedience to the Order and Discipline of the UMC), *available at* http://archives.umc.org/interior_judicial.asp?mid=263&JDID=1176&JDMOD=VWD&SN=1001&EN=1099; *In re: Request from the California-Pacific Annual Conference for a Declaratory Decision on the Constitutionality, Meaning, Application, and Effect of ¶ 359.3c(2) of the 2000 Discipline Concerning Administrative Location*, Decision No. 1010 (UMC Judicial Council, Apr. 29, 2005) (holding fair process was violated, reversing administrative location of clergy member, and ordering clergy's reinstatement to prior position along with retroactive benefits and compensation), *available at* http://archives.umc.org/interior_judicial.asp?mid=263&JDID=1087&JDMOD=VWD&SN=1001&EN=1099.

action.[10] The church's process of addressing ministerial employment issues begins with an informal process that has the goal of a "just resolution."[11] If a complaint is based on allegations of "incompetence, ineffectiveness, or unwillingness or inability to perform ministerial duties," the matter is referred as an administrative complaint to the Board of Ordained Ministry for remedial or other action.[12] If, however, a complaint is based on a chargeable offense, then it is converted into a judicial complaint subject to the UMC's judicial system.[13]

Under the UMC's judicial system, clergy may be tried in a formal process when charged with one or more of a list of offenses. Counsel for the UMC initiates such a proceeding by preparing a judicial complaint and referring it to a committee on investigation, which may issue a "bill of charges and specifications" identifying one or more offenses for trial.[14] Church trials, which the UMC considers "an expedient of last resort," are held before a thirteen-member "trial court" selected from a pool of thirty-five clergy "representative of racial, age, ethnic,

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10. Book of Discipline, Part II, Ch. 2, ¶ 361.

11. *Id.*, Part II, Ch. 2, ¶ 361. The complexity of the UMC's administrative and judicial system is underscored by the 230-page guide to the denomination's procedures. *See* General Council on Finance and Administration of The United Methodist Church, ***Administrative and Judicial Procedures Handbook*** (2011), ***available at*** http://www.gcfa.org/sites/default/files/u3/A%26JP%20Handbook.pdf.

12. Book of Discipline, Part II, Ch. 2, ¶ 362.

13. *Id.*

14. *Id.*, Part V, Ch. 7, ¶ 2706.

and gender diversity."[15] During a trial, the clergy member has the right to present a defense, which may include allegations of pretext.[16] A conviction must be based on clear and convincing evidence and requires the vote of at least nine members of the trial court.[17] Upon conviction, the trial court may hear further testimony on the proper penalty, which may include removal or suspension from office.[18]

An adverse decision of the trial court may be appealed to a committee on appeals, but only by the clergy member.[19] Ultimate review belongs to the Judicial Council.[20] The Judicial Council, the UMC's highest judicial body, is composed of nine members, including both lay and clergy members.[21] The UMC's goal is that the composition of the Judicial Council "should reflect the diversity of [the UMC], including racial, age, ethnic, [and] gender" diversity.[22]

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15. *Id.*, Part V, Ch. 7, ¶¶ 2707, 2709, 2712.3, 2713.3.

16. *Id.*, Part V, Ch. 7, ¶¶ 2710, 2701.2.

17. *Id.*, Part V, Ch. 7 ¶ 2711.

18. *Id.*, Part V, Ch. 7, ¶ 2711.

19. *Id.*, Part V, Ch. 7, ¶ 2715.10 (prohibiting appeal of trial court decision by the church).

20. *Id.*, Part V, Ch. 7, ¶¶ 2715–18.

21. *Id.*, Part V, Ch. 7, ¶ 2601–02; *see also* The United Methodist Church, *Rules of Practice and Procedure: The Judicial Council of The United Methodist Church* (Revised Apr. 2010), *available at* http://www.umc.org/atf/cf/%7Bdb6a45e4-c446-4248-82c8-e131b6424741%7D/RULES_ADOPTED_FINAL_APRIL_2010_A.PDF (Judicial Council's procedural rules).

22. Book of Discipline, Part V, Ch. 7, ¶ 2602.

B. The Presbyterian Church (U.S.A.)

The Presbyterian Church (U.S.A.) ("PC(USA)") and its predecessors have been in existence since the 1700s and have a longstanding system of internal governance, which was first recognized by this Court in 1871. *See Watson*, 80 U.S. (13 Wall.) at 727 ("There are in the Presbyterian system of ecclesiastical government in regular succession, the presbytery over the session or local church, the synod over the presbytery, and the General Assembly over all.").[23] PC(USA) has a structured system in which the sessions (individual congregations) are subject to a presbytery, which is subject to a synod, which is subject to the General Assembly. The presbyteries, synods, and General Assembly each have a permanent judicial commission.[24] Each presbytery's permanent judicial commission has authority to hear remedial and disciplinary cases concerning ministers, while the permanent judicial commissions of the synods and the General Assembly have jurisdiction over appeals.[25]

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23. The Court in *Watson* referred to one of the PC(USA)'s predecessor organizations, the Presbyterian Church in the United States. The present PC(USA) resulted from the union between the Presbyterian Church in the United States and the United Presbyterian Church in the United States of America in 1983. *See* Presbyterian Historical Society, A Brief History of the Presbyterian Church in this Country, *available at* http://www.history.pcusa.org/history/history.cfm (last visited June 17, 2011).

24. The PC(USA) maintains a database of decisions rendered by the permanent judicial commission of the General Assembly, the church's highest authority. The decisions are available at PC(USA) Office of the General Assembly, Permanent Judicial Commission Decisions, http://oga.pcusa.org/gapjc/decisions/decisions.htm.

25. The Constitution of the Presbyterian Church (U.S.A.), Part II, Book of Order 2009-2011 (The Office of the General

The PC(USA) believes that "[t]he church's disciplinary process exists not as a substitute for the secular judicial system, but to do what the secular judicial system cannot do."[26] The PC(USA)'s judicial process "is the means by which church discipline is implemented within the context of pastoral care and oversight" and represents "the exercise of authority by the governing bodies of the church for," among other things, "the prevention and corruption of offenses by persons."[27]

Recognizing that "all participants are to be accorded procedural safeguards and due process,"[28] the PC(USA)'s *Rules of Discipline* provide detailed procedures for conducting "disciplinary cases," in which "church officers" may be censured for an offense.[29] Likewise, the PC(USA)'s

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Assembly of the Presbyterian Church (U.S.A.) 2009) ("PC(USA) Rules of Discipline"), § D-5.0101, *available at* http://oga.pcusa.org/publications/2009-2011-boo.pdf; *id.* § D-3.0101(c). A remedial case involves "an irregularity or a delinquency of a lower governing body" (such as a congregation or presbytery). *Id.* § D-2.0202. Irregularities are erroneous decisions or actions by a pastor or higher body, and delinquencies are omissions or failures to act. *Id.* Remedial cases often involve disputes over interpretation of Scripture or doctrine. Disciplinary cases involve instances where a church officer performed an act or omission contrary to the Scriptures or Constitution of the PC(USA), and for which that officer may be subject to censure. *Id.* § D-2.0203.

26. PC(USA) Rules of Discipline, § D-1.0101, Preamble (describing purpose of discipline in the PC(USA)).

27. *Id.* § D-2.0101.

28. *Id.* § D-1.0101.

29. *Id.* § D-2.0103 (church officers are "ministers of the Word and Sacrament, elders, and deacons").

Association of Stated Clerks, an organization that serves to aid church clerks in their duties, provides a non-binding and advisory *Handbook For Judicial Process* to aid the permanent judicial commissions in following the proper procedures specified in the *Rules of Discipline* during investigations, trials, and appeals.[30]

A disciplinary case is initiated by the submission of a written statement of an alleged offense, and the *Rules of Discipline* delineate clear procedures to be followed when such accusations are leveled.[31] When an accusation is made, the presbytery's clerk informs the governing body that an offense has been alleged, and the governing body forms an investigative committee to determine whether charges should be filed.[32] The committee provides a copy of the accusation to the accused, informs the accused of the procedures to be followed, and conducts a thorough investigation.[33] The committee also can recommend alternative dispute resolution or mediation to resolve the charges leveled against the accused.[34] During all investigatory or trial proceedings, the accused has the right to an advocate.[35]

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30. The Association of Stated Clerks, *The Handbook For Judicial Process* (The Association of Stated Clerks, Presbyterian Church (U.S.A.) 4th ed. Oct. 2005), *available at* http://www.statedclerks.org/handbook_files.html.

31. PC(USA) Rules of Discipline, § D-10.0100 *et seq.*

32. *Id.* § D-10.0201-02(a).

33. *Id.* § D-10.0202.

34. *Id.* § D-10.0202(h).

35. *Id.* § D-10.0203(c); *id.* § D-11.0301.

If the committee determines by a two-thirds vote that charges should be filed, the accused is promptly informed, and the governing body designates a prosecuting committee in the name of the PC(USA).[36] Pre-trial conferences are held, witness and evidentiary lists are exchanged, and the time and location of the impending trial are set.[37] During trial, the accused has the right to be represented by an advocate who is a member of the PC(USA).[38] Trial procedures are carefully delineated and authority over the trial is vested in the session or permanent judicial commission before which the proceeding is heard.[39] Rules of evidence govern its admissibility at trial.[40]

To convict, two-thirds of the permanent judicial commission must "find that the pertinent facts within that charge have been proven beyond a reasonable doubt."[41] Upon a guilty verdict, the session or general assembly hears further evidence to determine the censure to be imposed.[42] "The degrees of church censure are rebuke, rebuke with supervised rehabilitation, temporary exclusion from exercise of ordained office or membership, and removal from ordained office or membership."[43]

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36. PC(USA) Rules of Discipline, § D-10.0402.

37. *Id.* § D-10.0405-406.

38. *Id.* § D-11.0301.

39. *Id.* § D-11.0300 *et seq.*; *id.* § D-11.0400 *et seq.*

40. *Id.* § D-14.000 *et seq.*

41. *Id.* § D-11.403(a).

42. *Id.* § D-11.0403(e).

43. *Id.* § D-12.0101.

The convicted has the right to appeal to the next higher governing body to obtain review of the decision.[44] Grounds for an appeal include irregularities in the proceedings, refusing a party a reasonable opportunity to be heard, allowing improper evidence to be heard at trial, refusing admission of proper evidence, rushing to conclude a trial before all evidence has been weighed, and any manifestation of prejudice during the proceeding.[45]

C. Roman Catholicism

The legal system of the Catholic Church is known as *ius canonicum* ("canon law"). Although it derives its guiding values from the teachings of Jesus Christ as preserved and proclaimed by the Catholic Church, canon law is primarily organized around juridic principles adopted from the Imperial Roman or "civil" legal system now practiced in continental Europe and throughout Latin America. *See* John Merryman, *The Civil Law Tradition* 10 (2d ed. 1985). Developed over many centuries and codified since the early 20th century,[46] canon law addresses virtually every aspect of

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44. *Id.* § D-13.0101.

45. *Id.* § D-13.0106(a)-(b).

46. Canon law was first codified early in the twentieth century by Pope Benedict XV. *See Codex Iuris Canonici, Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus, Acta Apostolicae Sedis* 9/2, at 3-521 (1917). This first comprehensive code, commonly known as the 1917 Code of Canon Law, was the primary legislative document of the Roman Catholic Church until it was replaced by the current canon law governing the Roman or Western Catholic Church, commonly known as the 1983 Code of Canon Law. *See Codex Iuris Canonici auctoritate*

ecclesiastical life for the Catholic Church's congregations in almost every corner of the world, including disciplinary matters regarding ministerial employees or officers, such as clergy or members of religious institutions. Such employment decisions are informed by both canon law and its accompanying commentary.

A useful illustration of canon law's ability (indeed, duty) to regulate a religious employment dispute in the Catholic Church would be to trace the stages of a hypothetically contested removal of a priest from his post as pastor of a parish. Where a priest declines an initial suggestion by the presiding bishop to resign, a bishop may, in accord with a series of steps outlined in Canons 1740–1747 of the 1983 Code of Canon Law, remove the priest from office. In the implementation of these sequentially mandated steps, the bishop would be guided by canonical counsel, who in turn would draw upon canonical commentary and, where necessary, other forms of ecclesiastical jurisprudence.

Should the priest challenge the sufficiency of the bishop's removal action, however, the priest has the right to take "recourse" (a form of appeal under administrative canon law) to the Congregation for the Clergy (a "dicastery" of the Holy See in Rome), which has jurisdiction to hear complaints against removal.[47] The Congregation of the Clergy has authority to confirm the bishop's decision, or to reinstate the pastor, or to return the matter for

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Ioannis Pauli PP. II promulgatus, *Acta Apostolicae Sedis* 75/2, at 1-320 (1983); English transl., Canon Law Society of America, Code of Canon Law, Latin-English Edition, New English Translation (Canon Law Society of America, 1999) ("1983 Code").

47. *See Pastor Bonus* art. 93 (1988) (apostolic constitution).

rehearing at the diocesan level. In reaching its decision, the Congregation of the Clergy would be guided by general principles of canon law (including those portions of the 1983 Code dealing with, for example, administrative acts, the rights and duties of priests, the rights and duties of pastors, the general norms on administrative recourse, and the special norms on removal of pastors)[48] and by the particular law of the Roman Curia.[49] In all respects, the Congregation for the Clergy is assisted by trained canonical counsel who in turn draw upon a sophisticated collection of scholarly commentaries which enjoy a respect in canonical circles akin to judicial precedent.[50]

Finally, a priest would have the right of recourse from the Congregation for the Clergy's decision to the dicastery known as the Supreme Tribunal of the Apostolic Signatura. This tribunal (whose jurisprudence dates back to the 13th century) functions as the court of last resort in the Catholic Church and is governed by the general principles of canon law[51] and by the apostolic letter *"Motu Proprio data" Antiqua ordinatione* (June 21, 2008). The Signatura has authority to, among other things, confirm

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48. *See, e.g.*, 1983 Code, c.35–58, c.273–89, c.515–52, c.1732–39, and c.1740–47.

49. This chiefly would be the apostolic constitution *Pastor Bonus* (1988) and the *Regolamento Generale della Roman Curia* (1999).

50. *See* 1983 Code, c.16–19; *see also* Edward Peters, "Lest amateurs argue canon law: a reply to Patrick Gordon's brief against Bp. Daily," 83 *Angelicum* 121, 121–42 (2006).

51. *See, e.g.*, 1983 Code c.1445; *Pastor Bonus* art. 121–25 (1988).

the bishop's decision, reinstate the priest, or return the matter for rehearing at the diocesan or dicasterial level. As before, in all respects the Signatura is assisted by canonical counsel who in turn draw upon a sophisticated collection of scholarly commentaries.

D. Judaism

The Jewish tradition has a decentralized, well-established and robust judicial system that resembles arbitration and has developed internationally through individual decisions and applications in ways similar to the common law familiar to the U.S. legal system. Jewish courts, known as *battei din* (*beth din* in the singular), resolve all manner of disputes, including those involving the duties, rights and employment of rabbis, other religious leaders, and employees of Jewish religious organizations such as temples and schools.[52]

Beth din tribunals have reflected and applied substantive Jewish law and civil procedure to disputes for thousands of years. A *beth din* typically is composed of a panel of three *dayanim*, or judges, or a single *dayan*, who will conduct a *din torah*, an arbitral proceeding designed to resolve the dispute in reliance on *halacha*, Jewish law. A

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52. *Beth din* arbitration activities related to disputes generally, and the enforceability in civil courts of those resolutions, have been the subject of extensive judicial and academic commentary. *See, e.g.*, Ginnine Fried, Comment, *The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts*, 31 Fordham Urb. L.J. 633, 653–54 (2004). Issues surrounding the enforceability of arbitral decisions by religious tribunals are not impacted by the ministerial exception at issue here.

beth din may look to Jewish legal experts' written answers to questions posed by an individual, a group of individuals, or a specific community, called ***responsa***, of which there are hundreds of thousands that inform *dayanim* decision-making; a ***beth din*** also may scrutinize Jewish legal commentaries and restatements that give substantive content to their decisionmaking process.

Beth Din of America is a modern example of a *beth din* court.[53] Founded in 1960, Beth Din of America "provide[s] a forum where adherents of Jewish law can seek to have their disputes resolved in a manner consistent with the rules of Jewish law (halacha)."[54] ***Battei din***, including Beth Din of America, are regularly called upon to evaluate and adjudicate disputes over, for example, teacher termination, severance pay, and rabbinical tenure. They can also make decisions about the selection of particular communities' religious leaders.[55]

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53. *See* Beth Din of America, Organization and Affiliations http://www.bethdin.org/organization-affiliations.asp.

54. Beth Din of America, Rules and Procedures of the Beth Din of America, Preamble § (a), *available at* http://www.bethdin.org/docs/PDF2-Rules_and_Procedures.pdf ("Beth Din Rules and Procedures").

55. *See, e.g.*, Michael Broyde, *Severance Pay for Yeshiva Day School Employees*, at 1, *available at* http://www.jlaw.com/Articles/SEVERANCarticle.pdf ("[O]ne matter that is frequently litigated in dinai torah is claims for severance pay under Jewish law for employees of Jewish school[s]. . . . As is widely known, there is a common practice in Jewish education institutions that when a Judaic studies faculty member or administrator is either terminated from employment or denied a regularly expected renewal, without due cause, severance pay must be provided."); *see also, e.g., Brisman v. Hebrew Academy of Five Towns &*

To facilitate the performance of these functions, Beth Din of America has adopted Rules and Procedures "designed to provide a process of dispute resolution in a Beth Din [and] which are in consonance with the demands of Jewish law that one diligently pursue justice, while also recognizing the values of peace and compromise."[56] The Rules and Procedures explain that Jewish law "provide[s] the rules of decision and rules of procedure that govern the functioning of the Beth Din," except where the parties have agreed to a choice of law provision or where the parties accept "the common commercial practices of any particular trade, profession, or community."[57] The Rules and Procedures also require that the parties have entered into an agreement to arbitrate before Beth Din of America.[58] Finally, parties appearing before Beth Din of America have the right to petition for modification of a *beth din*'s decision, and the Av Beth Din, a supervising rabbi of Beth Din of America, may overturn the *beth din* decision to the extent it is contrary to Jewish law.[59]

Rockaway, 895 N.Y.S.2d 482, 483 (N.Y. App. Div. 2010) (*beth din* affiliated with Beth Din of America found that tenured teacher at Jewish school was wrongfully terminated without just cause and ordered reinstatement of teacher, along with back pay and benefits); *Blitz v. Beth Isaac Adas Israel Congregation*, 720 A.2d 912, 913 (Md. 1998) (*beth din* ordered synagogue to pay rabbi to resolve employment dispute).

56. Beth Din Rules and Procedures, Preamble § (b).

57. *Id.* § 3(c)–(e).

58. *Id.* § 2.

59. *Id.* § 31(a).

Although Beth Din of America has published formal procedures, all *battei din* in the United States and around the world are governed by a form of Jewish civil procedure and Jewish law, and interpret and apply that law in individual cases. This law is not codified like canon law, but is left to individual *dayan* and rabbis to interpret, and this law provides the guidelines and substance for *dayanim* confronting disputes over employment and doctrine and is relied on internationally by *battei din* from New York to Israel. This development of the law provides a medium for the maintenance and development of the Jewish faith, beginning thousands of years ago and continuing to this day.

E. The Episcopal Church

Many other religious traditions besides those discussed in this brief and represented by *amici* have established religious tribunals. To give just one example of another ecclesiastical system, the Episcopal Church has a formal disciplinary process that applies to allegations of misconduct by any member of the clergy. These proceedings are "neither civil nor criminal but ecclesiastical in nature" and "represent the responsibility of the Church to determine who shall serve as Members of the Clergy of the Church."[60] The disciplinary process is premised on the principle that "Members of the Clergy have voluntarily sought and accepted positions in the

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60. The General Convention of the Episcopal Church, *Constitution and Canons of the Episcopal Church*, § IV.19.1 (2009), *available at* http://extranet.generalconvention.org/staff/files/download/648 ("Episcopal Constitution").

Church and have thereby given their consent to subject themselves to the Discipline of the Church."[61]

The Episcopal Church's disciplinary process is currently in transition, with new procedures to take effect July 1, 2011. Previously, trial proceedings were formalized and evidence was admissible only in accordance with the Federal Rules of Evidence.[62] The Episcopal Church recently instituted reforms to reflect to a greater degree its theological beliefs and convictions, such as incorporating wherever possible a spirit of reconciliation and healing.[63]

Under the revised procedures, any allegation of misconduct is subject to multiple layers of review.[64] Persons who have information about an offense subject to disciplinary action are directed to forward the information

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61. *Id.*

62. *See* The General Convention of the Episcopal Church, *Constitution and Canons of the Episcopal Church*, § IV.4.10 (2006), *available at* http://extranet.generalconvention.org/staff/files/download/378.

63. *See* The General Convention of the Episcopal Church, *Report to the 76th General Convention* at 768, *available at* http://extranet.generalconvention.org/staff/files/download/364. At many stages of the proceeding, a process called "Conciliation" is available. Conciliation is a form of negotiated settlement designed to "seek a resolution which promotes healing, repentance, forgiveness, restitution, justice, amendment of life and reconciliation among the Complainant, Respondent, affected Community, other persons and the Church." Episcopal Constitution, § IV.10.1.

64. Episcopal Constitution, § IV.5 (2009).

to an Intake Officer,[65] who conducts a preliminary investigation and prepares a written report to determine whether or not allegations should be considered by the Reference Panel.[66] The Reference Panel then decides upon an appropriate response to the allegations, with the assistance of an appointed Investigator.[67] These responses include informal pastoral care, disciplinary action negotiated with the local bishop, continued factual investigation, or no action at all.

If a formal prosecution is deemed necessary, the matter is referred to the Conference Panel, which hears evidence and engages in a confidential, informal, and conversational proceeding with the respondent present.[68] The Conference Panel may take various actions, including referral to the Hearing Panel.[69] The Hearing Panel engages in public proceedings modeled after an adversarial hearing in which evidence and testimony may be presented,[70] witnesses cross-examined, and rebuttal evidence presented by the respondent.[71] The Hearing Panel may then issue a ruling restricting "the involvement, attendance or participation of the respondent in the Community" or issue other appropriate disciplinary

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65. *Id.* § IV.6.3 (2009).

66. *Id.* § IV.6.4 (2009).

67. *Id.* § IV.6.8; *id.* § IV.11.2 (2009).

68. *Id.* § IV.12.7 (2009).

69. *Id.* § IV.12.9 (2009).

70. *Id.* § IV.13.6 (2009).

71. *Id.*

measures.[72] Finally, a Provincial Court of Review may review the determinations of the Hearing Panel.[73]

In total, the section of the Episcopal Constitution and Canons concerning ecclesiastical discipline contains over forty pages of definitions, rules, and procedures designed to ensure that members of the clergy receive a fair resolution of all disciplinary matters in a manner consistent with the Episcopal faith.[74]

II. The First Amendment Necessitates Respect for the Role of Religious Tribunals

The case before the Court directly impacts the religious courts discussed above because they hear and resolve disputes involving ministerial and other religious employees, from bishops, nuns, and rabbis to school officials and church functionaries. These tribunals represent the efforts of certain religious organizations to enforce doctrinal standards and to regulate their membership and leadership. They are thus critical to the mission and identity of these individual organizations.

In prior decisions, this Court has observed that religious organizations have First Amendment rights to self-govern. Furthermore, the Court has recognized that religious tribunals are essential extensions of their respective religious organizations and therefore are entitled to deference by civil courts under the First

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72. Episcopal Constitution, § IV.14.1 (2009).

73. *Id.* § IV.15 (2009).

74. *Id.* § IV (2009).

Amendment. Today, a number of religious organizations continue to look to religious tribunals to resolve questions of faith and practice for their adherents. In determining the scope of the ministerial exception in this case, therefore, the Court should reaffirm the core First Amendment interests of religious organizations to resolve disputes about their personnel, doctrines, and values internally through religious, rather than civil, courts.

Unlike the decisions of many other courts that have applied the ministerial exception, the Sixth Circuit's decision in this case grants civil courts permission to impermissibly intrude upon core First Amendment territory by second-guessing the true motivations of a religious organization's ministerial employment decision. And it further erodes religious organizations' ability to manage their internal affairs by taking a crabbed and grudging view of what personnel constitute "ministerial" employees. The Sixth Circuit's decision thus allows civil law to interfere with, collaterally attack, and override determinations about religious leadership and doctrine made by those entrusted by their religious communities with the critical mission of ensuring fidelity to their faith. The Court should not countenance this erosion of a vital element of religious expression and worship and should reject the Sixth Circuit's approach.

A. This Court Should Reaffirm the Core First Amendment Right of Religious Organizations to Self-Govern, Including through Religious Tribunals

The Court previously has acknowledged that religious organizations have a fundamental First Amendment

right to self-govern. This right extends to a religious organization's decision to resolve internal disputes through religious tribunals. In evaluating the scope of the ministerial exception, the Court should reaffirm the First Amendment rights of these organizations.

In *Watson*, which involved an internal dispute of a predecessor to the PC(USA), the Court first recognized that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom or law have been decided by the highest of church judicatories to which the matter has been carried," civil courts must accept the decision as final and binding. *Watson*, 80 U.S. (13 Wall.) at 727. In so holding, the Court acknowledged that the local congregation where the property dispute arose was "itself but a member of a much larger and more important religious organization, and is under its government and control, and is bound by its orders and judgments." *Id.* at 726–27.

Watson did not articulate a constitutional rule, but the Court rooted its reasoning in religious freedom, anti-establishment, and associational principles:

> The law knows no heresy and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association . . . is unquestioned.

Id. at 728–29. Under *Watson*, respect for the decisions of religious courts was "founded in a broad and sound view of the relations of church and state." *Id.* at 727. The Court

also acknowledged that granting civil courts jurisdiction to review the decisions of religious courts could fatally undermine the system of internal government on which such religious organizations were based:

> All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.

Id. at 729.

In *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich*, 426 U.S. 696 (1976), the Court confirmed that the principles in *Watson* extended beyond church property disputes to church governance matters generally, holding that a state supreme court's inquiry into the defrocking of a bishop violated the First Amendment. *Id.* at 697–98; *see also id.* at 710 ("This principle applies with equal force to church disputes over church polity and church administration."). The "fallacy fatal" in the state court's decision was that it "rest[ed] upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute" and "impermissibly substitute[d] its own inquiry into church polity." *Id.* at 708–12.

The First Amendment principles that animated *Watson* and *Serbian* unquestionably reach and protect the decisions of religious courts on matters of religious discipline and employment. *See Serbian*, 426 U.S. at 709

("Resolution of the religious dispute over Dionisije's defrockment therefore determines control of the property. Thus, this case essentially involves not a church property dispute, but a religious dispute the resolution of which under our cases is for ecclesiastical and not civil tribunals."). The Court's precedents firmly establish the First Amendment right of every religious organization to determine its own path free from outside government interference. By extension, civil courts generally must defer to the decisions of a religious tribunal, including those involving ministerial employees. Many religious organizations, including those discussed above, have established religious tribunals and granted them authority to resolve religious employment disputes. Each of these tribunals represents the genuine effort of a religious organization to provide a forum for equitably resolving such disputes, in a manner consistent with the values of the faith. And each of these tribunals relies, to some extent, on the resolution of such disputes to further refine and develop its faith tradition.

Encouraging questions of religious doctrine and discipline to be litigated in the first instance before civil courts, or sanctioning collateral attacks on religious tribunal decisions, will harm these organizations. Ecclesiastical court decisionmaking is critical to the enforcement and development of these faiths' religious doctrine. Thus, in addition to interfering and intruding into their internal affairs, a regime that countenances such litigation and review risks depriving these organizations of the opportunity to continue developing their substantive law and doctrine through case by case adjudication and refinement. Moreover, opening the door to civil court review would render those religious tribunal decisions

advisory, thereby undercutting their intended purpose of resolving ecclesiastical disputes with finality. *Watson*'s caution about the inhibiting effect that civil review of religious questions would have on the voluntary nature of these organizations still rings true today. *See* 80 U.S. (13 Wall.) at 728–29 ("It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.").

As the Court considers the contours of the ministerial exception, it should reaffirm the deference due to religious tribunals on matters of personnel management, discipline, and employment.

B. The Sixth Circuit's Decision Fails to Give Proper Weight to the First Amendment Rights of Religious Organizations

The Sixth Circuit's decision fails to respect the First Amendment rights of a religious organization that entrusts its internal ministerial employment disputes to a religious court. The panel opined broadly that "this Court would not be precluded from inquiring into whether a doctrinal basis actually motivated Hosanna-Tabor's actions." *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*, 597 F.3d 769, 782 (6th Cir. 2010) (Pet. App. at 24a). This suggestion flies in the face of the core First Amendment principles recognized in *Watson* and *Serbian*, which require civil courts to *accept* the decision of a religious court on a matter of internal governance, not to second guess it as pretextual. In *Serbian*, the Court

underscored this deferential approach to civil court review of the decisions of religious tribunals when it rejected an "arbitrariness" standard that would have permitted civil courts to inquire into whether the religious tribunal had complied with its own church laws and regulations. 426 U.S. at 713. "Indeed, it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria." *Id.* at 714–15. As the Court acknowledged in *Serbian*, civil court review of religious tribunal decisions is antithetical to the fundamental tenets of faith on which a religious organization is built.

Contrary to the Sixth Circuit's approach, other lower courts have applied the ministerial exception to accept the decisions of religious courts on matters of ministerial employment and discipline as binding. For example, in *Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008), the Second Circuit held that the ministerial exception precluded a former Catholic priest from bringing a Title VII claim against his bishop and diocese for his removal from office. *Id.* at 209–10. Noting that the priest had appealed his dismissal to the Catholic Church's Congregation of the Clergy, which had affirmed his removal, the court asked rhetorically, "[H]ow are we, as Article III judges, to gainsay the Congregatio Pro Clericis' conclusion that Father Justinian is insufficiently devoted to ministry? How are we to assess the quality of his homilies?" *Id.* at 200, 209 (priest's Title VII claim that Congregation of the Clergy's decision was pretextual "cannot be heard by [the court] without impermissible entanglement with religious doctrine"); *see also Serbian*, 426 U.S. at 714 n.8 ("Civil judges obviously do not have the competence of ecclesiastical tribunals in applying the 'law' that governs

ecclesiastical disputes, as *Watson* cogently remarked . . . ." (citation omitted)).

Similarly, a prior decision from the Sixth Circuit, *Lewis v. Seventh Day Adventists Lake Region Conference*, 978 F.2d 940 (6th Cir. 1992), illustrates the errors of the panel decision currently before the Court. In *Lewis*, the Sixth Circuit affirmed the district court's dismissal of the claims of a minister and his wife against a conference of the Seventh Day Adventist Church for breach of contract, promissory estoppel, intentional infliction of emotional distress, and loss of consortium. *See id.* at 941–43. In so holding, the *Lewis* court rejected as contrary to the First Amendment the plaintiffs' argument that "civil courts sometimes may intervene in employment disputes between churches and clergy" in instances where "the plaintiff alleges that the religious tribunal's decision was based on a misapplication of its own procedures and laws." *Id.* at 942–43; *see also Crowder v. Southern Baptist Convention*, 828 F.2d 718, 726–27 (11th Cir. 1987) (deferring to the Southern Baptist Convention as an ecclesiastical tribunal); *Kral v. Sisters of the Third Order Regular of St. Francis of the Congregation of Our Lady of Lourdes*, 746 F.2d 450, 451 (8th Cir. 1984) (per curiam) (affirming dismissal of complaint by nun expelled from membership based on the decision of Catholic Church's judicial authorities).

While professing faithful adherence to *Serbian* and *Lewis*, the Sixth Circuit's decision fails to properly account for the breadth of the First Amendment principles at stake, casting uncertainty on the ability of religious organizations to rely on their religious courts to resolve ministerial employment disputes. *See Hosanna-Tabor*, 597 F.3d at 777 (Pet. App. at 15a) (generally citing *Serbian*

and *Lewis*). As the Court grapples with the scope of the ministerial exception in this case, it should acknowledge the role of religious courts in deciding internal employment disputes and give due regard to the First Amendment rights of the religious organizations that rely on them.

CONCLUSION

The Court has before it a case that touches a core prerogative of every religious organization: the right to choose its religious leaders and the corollary right to discipline or dismiss them. Many religious faiths have chosen to exercise this right in part through religious courts. The First Amendment requires civil courts to show due regard for the decisions of these religious courts as unique expressions of the beliefs and values of the faiths they represent. Because the opinion below fails to protect these First Amendment interests, the Court should reverse the Sixth Circuit's decision and vindicate First Amendment freedoms by endorsing a robust ministerial exception.

Respectfully submitted,

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APPENDIX

APPENDIX — LIST OF DISTINGUISHED EXPERTS ON RELIGIOUS TRIBUNALS

William Edwin Chapman

Dr. Chapman's fifty-three year career as a minister in the Presbyterian Church (U.S.A.) included numerous roles as pastor, teacher, and administrator at local, area, regional, and national church bodies. He holds degrees from the College of Wooster (B.A.) and Princeton Theological Seminary (B.D., M.R.E., Ph.D.) and has authored four books on church life, including a widely used text regarding Presbyterian polity (governance), a topic he also taught for a decade in two seminaries. Dr. Chapman served six years on a regional church court and has testified as an expert witness in civil cases around the country regarding church governance issues. In 2010, the Presbyterian Church (U.S.A.)'s Association of Stated Clerks conferred on him their national award for distinguished service in the church's polity.

Edward N. Peters

Dr. Peters holds the Edmund Cdl. Szoka Chair at Sacred Heart Major Seminary in Detroit, Michigan. He is a graduate of Saint Louis University (B.A.), the University of Missouri at Columbia School of Law (J.D.), and The Catholic University of America School of Canon Law (J.C.L., J.C.D.). Dr. Peters practiced canon law for more than ten years, holding prominent canonical offices such as Collegial Judge at the trial and appellate levels, Diocesan Chancellor, Promoter of Justice, Defender of the Bond, and Director of the Office of Canonical Affairs. He has taught canon law for ten years and published dozens of articles

and reviews in peer-reviewed canonical and secular law reviews. In 2010, Pope Benedict XVI appointed Dr. Peters to a five-year term as a "Referendary" (consultant) to the Supreme Tribunal of the Apostolic Signatura, the Catholic Church's highest administrative court. Dr. Peters is the first layperson to be a Referendary since the Signatura was reconstituted in 1908.

Richard J. Rettberg

Mr. Rettberg earned a B.A. from the University of Illinois at Urbana-Champaign and a J.D. from the Illinois Institute of Technology/Chicago-Kent College of Law. He currently is General Counsel for the General Council on Finance and Administration of The United Methodist Church, a position he has held for four years. Prior to that, he was a partner with a Chicago litigation firm for twenty-nine years. As a part of his regular duties, Mr. Rettberg is expected to be knowledgeable about The United Methodist Church's *Book of Discipline*, including the provisions relating to clergy discipline matters and judicial proceedings, and he frequently is consulted by various parties within The United Methodist Church on those issues. Mr. Rettberg has traveled to Europe, Africa, and the Philippines to consult with church leaders on church law issues, including clergy discipline matters and judicial proceedings.

Appendix

Ronald Warburg

Rabbi Dr. Ronald Warburg is an internationally recognized scholar of Jewish law and a sitting *dayan* (judge) at the Beth Din of America in New York City. He also serves as research fellow at the Institute of Jewish Law at Boston University School of Law. He serves on the editorial boards of The Jewish Law Annual and Tradition and served as Chairman of the Jewish Law committee for the International Association of Jewish Lawyers and Jurists. Rabbi Warburg has published numerous articles in refereed journals in the areas of family law, bioethics, contracts and securities law addressing the interface of Jewish law and American law. A series of *beth din* decisions in commercial and family matters authored by Rabbi Warburg will appear in his forthcoming book entitled *Rabbinic Authority: The Vision & the Reality*. Rabbi Warburg earned his rabbinic ordination at Yeshiva University, an S.J.D. at the Hebrew University Faculty of Law, and an M.A. at New York University.

AMICUS CURIAE BRIEF

No. 10-553

In The Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *ET AL.*

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

BRIEF OF THE RUTHERFORD INSTITUTE, AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The federal courts of appeals have long recognized the "ministerial exception," a First Amendment doctrine that bars most employment-related lawsuits brought against religious organizations by employees performing religious functions. The circuits are in complete agreement about the core applications of this doctrine to pastors, priests, and rabbis. But they are evenly divided over the boundaries of the ministerial exception when applied to other employees. The question presented is:

Whether the ministerial exception applies to a teacher at a religious elementary school who teaches the full secular curriculum, but also teaches daily religion classes, is a commissioned minister, and regularly leads students in prayer and worship.

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I

INTEREST OF *AMICUS CURIAE*[1]

Since its founding nearly 30 years ago, The Rutherford Institute has emerged as one of the nation's leading advocates of civil liberties and human rights, litigating in the courts and educating the public on a wide variety of issues affecting individual freedom in the United States and around the world.

The Institute's mission is twofold: to provide legal services in the defense of civil liberties and to educate the public on important issues affecting their constitutional freedoms. Whether our attorneys are protecting the rights of parents whose children are strip-searched at school, standing up for a teacher fired for speaking out about religion, or defending the rights of individuals against illegal searches and seizures, The Rutherford Institute offers assistance—and hope—to thousands.

The Institute has repeatedly demonstrated its commitment to defending freedom of religion, along with our nation's other vital freedoms. To that end, The Institute actively participates in cases addressing the First Amendment's guarantee of religious freedom. The Institute served as *amicus curiae* in prior religious freedom cases before this

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[1] Counsel of record to the parties have consented to the filing of this brief, and their letters of consent have been lodged with the Clerk of the Court. No counsel to any party authored this brief, in whole or in part, nor has any person or entity other than *amicus curiae* and its counsel made a monetary contribution funding the preparation or submission of this brief.

Court, including *Sossamon v. Texas*, __ U.S. __ , 131 S. Ct. 1651 (2011); *Cutter v. Wilkinson*, 544 U.S. 709 (2005); and *Hobbie v. Unemployment Appeals Comm'n. Of Fla.*, 480 U.S. 136 (1987).

Each year, The Institute receives numerous complaints involving misinterpretation of the First Amendment's free exercise and establishment clauses. The extent of misunderstanding regarding the proper scope of the First Amendment's religion clauses, and the number of potential lawsuits resulting from this misunderstanding, is alarming.

This widespread doctrinal confusion is reflected in the varying approaches taken by the lower courts in applying the "ministerial exception," at issue in this case. In addressing the extent to which the ministerial exception applies beyond the easy cases involving priests, rabbis and pastors, the lower courts have not only reached different results in essentially similar cases, they have applied different tests. The Institute presents this brief in the hope that it will assist the Court in bringing clarity to the law. By returning to the fundamental First Amendment principles that animate and justify the ministerial exception, the Court can fashion a standard that is more protective of the important freedoms at stake, flexible rather than rigid and formulaic, easier for the lower courts to apply without unwarranted interference with the internal affairs of religious organizations, and more predictable and principled in its outcomes.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

All of the circuit courts that have addressed the issue have recognized that the Constitutional imperative to protect the "wall of separation" between church and state, *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947), requires a strong ministerial exception, barring most employment-related lawsuits between religious organizations and those of their employees who play an important role in the religious mission of the organization, regardless of whether those employees are formally ordained as "ministers."[2] Indeed, in the first circuit court decision to adopt it, the Fifth Circuit recognized that the ministerial exception is vital to protect what this Court has called "'a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for

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[2] See, *e.g.*, *Rweyemamu v. Cote*, 520 F.3d 198, 208 (2d Cir. 2008); *Petruska v. Gannon Univ.*, 462 F.3d 294, 307 (3d Cir. 2006); *E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 800 (4th Cir. 2000); *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007); *Alicea-Hernandez v. Catholic Bishop*, 320 F.3d 698, 702-3 (7th Cir. 2003); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362 (8th Cir. 1991); *Werft v. Desert Sw. Annual Conference of the United Methodist Church*, 377 F.3d 1099, 1100-1 (9th Cir. 2004); *Bryce v. Episcopal Church*, 289 F.3d 648, 656 (10th Cir. 2002); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1303 (11th Cir. 2000); *E.E.O.C. v. Catholic Univ.*, 83 F.3d 455, 461 (D.C. Cir. 1996).

themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *McClure v. Salvation Army*, 460 F.2d 553, 558-60 (5th Cir. 1972) (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)) (refusing to consider a Title VII discrimination suit brought by a minister against her church because "[t]he relationship between an organized church and its ministers is its lifeblood. * * * Matters touching this relationship must necessarily be of prime ecclesiastical concern.").

Paradoxically, however, although the ministerial exception has gained broad acceptance in the federal courts as a doctrine necessary to safeguard the autonomy of religious organizations, a number of the circuit courts have adopted an intrusive test for determining whether an employee qualifies as a "minister" that is "the very opposite of that separation of church and State contemplated by the First Amendment." *McClure*, 460 F.2d at 560. The "primary duties" test, under which a secular court decides whether, in its view, "the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship," *Rayburn v. Gen. Conference of Seventh-day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985), necessarily involves judicial assessments—as to which of an employee's duties are "religious" activities, and which merely secular, and which of an employee's duties are "primary," and which of lesser importance—that raise the very Free Exercise and Establishment Clause problems that necessitated the creation of the ministerial exception in the first place.

As this Court realized, "[t]he prospect of a church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." *New York v. Cathedral Academy*, 434 U.S. 125, 133 (1977). Yet, the primary duties test requires the court to engage in exactly that prohibited debate. A doctrine created to protect the autonomy of religious organizations has been applied by courts using the primary duties test to threaten that very autonomy.

The problem is starkly illustrated by the Sixth Circuit's decision in this case. *E.E.O.C. v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769 (6th Cir. 2010). The circuit court recognized that Ms. Perich was a "called" teacher and "commissioned minister" hired by a vote of the members of the Hosanna-Tabor congregation. *Id.* at 772. The court acknowledged that to qualify as a "called teacher," Perich was required to complete the colloquy of classes required by the Lutheran Church-Missouri Synod, focusing on various aspects of the faith, and to become a "commissioned minister." *Id.* The court accepted that Perich performed important religious duties: she led her classes in prayer three times every day; taught religion classes four days every week; led students in daily devotional exercises; attended chapel service with her students every week; led the chapel service twice a year in rotation with other teachers; and was required by her calling to "bring God into every subject taught in the classroom," in furtherance of the school's mission to provide "Christ-centered education." *Id.* The court acknowledged that Perich was removed by a vote of

the congregation to rescind her call and terminate her ministry. *Id.* at 775. The court further acknowledged Hosanna-Tabor's belief that Perich was bound by church doctrine to contest the termination of her ministry and employment only within the church (but dismissed the point as a mere "attempt[ ] to reframe the underlying dispute.")[3] *Id.* at 781. Despite all of that, the Sixth Circuit found that the ministerial exception did not apply to bar Perich's legal challenge to the termination of her employment, primarily because "Perich spent approximately six hours and fifteen minutes of her seven hour day teaching secular subjects." *Id.* at 780.

The Sixth Circuit disregarded the fact that Perich was a commissioned minister by denigrating that status to a mere "title," thereby rejecting the church's own view of its religious importance. See *id.* at 780-81 (the "primary duties analysis requires a court to objectively examine an employee's actual job function, not her title, in determining whether she is properly classified as a minister."). In conducting

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[3] The record demonstrates that Hosanna-Tabor has a religious basis for the requirement that its disputes with commissioned ministers be decided exclusively within the church, and that Perich *agreed* that such disputes would be settled exclusively within the church. Pet. App. 77a – 104a; J.A. 48, 152. Indeed, the Synod's dispute resolution procedure cites Holy Scriptures (*1 Corinthians* 6:1-7) for the duty of Christians to "settle their disputes by laying them before the 'members of the brotherhood,'" and states that "[f]itness for ministry and other theological matters must be determined within the church." Pet. App. 77a.

this "objective" analysis of Perich's function, the Sixth Circuit believed that "[t]he fact that Perich participated in and led some religious activities throughout the day does not make her primary function religious." *Id.* at 780. Rather, according to the circuit court, "Perich's primary duties were secular, not only because she spent the overwhelming majority of her day teaching secular subjects using secular textbooks, but also because nothing in the record indicates that the Lutheran church relied on Perich as the primary means to indoctrinate its faithful into its theology." *Id.* at 781.

The Sixth Circuit's judgments—that Perich spent only "forty-five minutes of the seven hour school day" engaged in what the court considered to be religious duties (*id.* at 780), notwithstanding the church's view that her duty was to "bring God into every subject" she taught; that the length of time spent on religious activities answers the question of the importance of Perich's religious role; that the court could assess whether the church relied on Perich to "indoctrinate its faithful" and that the church was only entitled to invoke the ministerial exception if Perich was the "primary" means by which the church spread the faith—all reflect a narrow, rigid and mechanical application of the ministerial exception that is utterly divorced from the exception's purpose to maintain that "wall of separation" between church and State, of which this Court has said, "[w]e could not approve the slightest breach." *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

To protect that "wall of separation," the Court should reject the primary duties test in favor of a

more sensitive and nuanced standard. The issue, after all, is not whether the employee's "primary duties" (measured by the time spent on such activities during the day) are "religious," in the view of the court; the issue is whether dismissal of the suit is necessary "to avoid judicial involvement in religious matters." *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008). The answer to that much broader question does not turn solely, or even primarily, on the quantity of time spent on particular activities during the day, and the Court should reject the "arbitrary 51% requirement implicit in the 'primary duties' test." *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 598 F.3d 668, 676 (9th Cir. 2010), *reh'g en banc granted*, 617 F.3d 1101 (9th Cir. 2010) and *vacated in part, adopted in part*, 627 F.3d 1288 (9th Cir. 2010). Moreover, the test for invocation of the ministerial exception should consider not merely the nature of the employee's duties but also the nature of the dispute, *Rweyemamu v. Cote*, 520 F.3d 198, 207-09 (2d Cir. 2008), and whether adjudicating the dispute is likely to entangle the court in matters of religious doctrine.

Finally, and most importantly, to avoid creating the problems of entanglement that the ministerial exception was designed to avoid, courts must defer to religious organizations' own assessments of the religious significance of their employees' duties. In order to safeguard religious liberty while avoiding the risks of entanglement, the Court should adopt a standard similar to the Seventh Circuit's test, which declines to second-guess religious institutions' own views of the religious importance of their employees' functions, but instead employs "a presumption that

clerical personnel" are within the ministerial exception, rebuttable by proof that "the church is a fake," or the minister's title is a sham, or her function "entirely rather than incidentally commercial." *Schleicher*, 518 F.3d at 477-78. There is no doubt that the Petitioner would have prevailed under the Seventh Circuit's standard. More generally, and more importantly, under such a standard, religious institutions would enjoy greater freedom and autonomy in matters of faith, courts would be less at risk of becoming entangled in religious issues, and judicial decisions in this area would be clearer, more consistent and more predictable.

Protecting the "wall of separation" between church and State requires vigilance against even well-intentioned incursions by courts and government bureaucrats (perhaps especially against such). As this Court has warned, "the breach * * * that is today a trickling stream may all too soon become a raging torrent * * *." *School Dist. of Abington, Twp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963).

ARGUMENT

I. THE PRINCIPLES ADOPTED IN THE COURT'S PRIOR RELIGION CASES DICTATE RECOGNITION OF A ROBUST MINISTERIAL EXCEPTION.

Although this Court has never decided a ministerial exception case *per se*, the lower courts recognized from the start that the ministerial exception is built on the foundation of this Court's prior seminal religion cases. See, *e.g.*, *McClure v.*

Salvation Army, 460 F.2d 553, 559-60 (5th Cir. 1972) (discussing the Court's key religion decisions, in adopting the ministerial exception). In the nearly forty years since *McClure* was decided, however, some courts have lost sight of the fundamental principles established in the Court's cases, applying the ministerial exception in a mechanical fashion that fails to protect core First Amendment values. To fashion the proper test, the Court should return to the fundamental principles it has long recognized.

The Court began to build the "wall of separation" between church and state in *Watson v. Jones*, 80 U.S. 679 (1871), a contest between two factions for control of church property in Kentucky resulting from a schism over the slavery question. One of the factions had been recognized by the highest ecclesiastical body of the Presbyterian Church as the "regular and lawful" governing body of the church. *Id.* at 694. Rejecting the contrary view of the English courts, the Court held that civil courts have no authority to question such an ecclesiastical ruling. *Id.* at 728-29. Although *Watson* was decided prior to judicial recognition of the Fourteenth Amendment's incorporation of the First Amendment to restrain state action, the opinion "radiates * * * a spirit of freedom for religious organizations" that the Court would later declare to have "Constitutional protection." *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1929). See *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 445 (1969) (although decided before the application of the First Amendment to the States, *Watson* was "informed by First Amendment considerations").

The *Watson* Court grounded its decision on three fundamental liberties: the right to free exercise of religion, the prohibition on government establishment of religion, and freedom of association:

> In this country, the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine * * * is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all of the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. *It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical*

> *cognizance, subject only to such appeals as the organism itself provides for.*

Id. at 728-29 (emphasis added). In sweeping language that remains relevant today, the Court declared that a "rule of action" protecting the autonomy of religious organizations to decide religious questions is necessary to protect "that full, entire and practical freedom for all forms of religious belief and practice which lies at the foundation of our political principles." *Id.* at 727-28.

Based on *Watson*, the Court has repeatedly instructed that courts cannot dictate to religious institutions the selection or removal of ministers. The Court relied on *Watson* fifty years later in holding that the courts could not second-guess a decision of the Archbishop of Manila refusing to appoint the petitioner to a chaplaincy for lack of qualification under Canon Law. *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929). Noting that the appointment was "a canonical act," the Court ruled that "it is the function of the church authorities," and not a civil court, "to determine what the essential qualifications of a chaplain are and whether the candidate possesses them." *Id.* at 16.

In *Kedroff*, the principles espoused in *Watson* and *Gonzalez* were explicitly recognized to be mandated by the Constitution. The Court invalidated a New York statute, passed in the wake of the Russian Revolution, that purported to transfer control over Russian Orthodox churches in this country from the patriarch of Moscow to authorities selected by the North American churches. Although the case involved competing rights to control of a particular

cathedral, the Court understood that what really was at stake was "the power to exercise religious authority," "a claim which cannot be determined without intervention by the State in a religious conflict." 344 U.S. at 121 (Frankfurter, J., concurring). The Court concluded that the New York law violated the Constitution because it "prohibit[ed] the free exercise of religion," which requires that religious institutions have the "power to decide for themselves, free from state interference, matters of church government, as well as those of faith and doctrine." 344 U.S. at 116, 120. Included within this sphere of autonomy is "[f]reedom to select the clergy." *Ibid.*

Nearly fifty years after *Kedroff*, the Court relied on that decision in ruling that civil courts have no authority to entertain a suit seeking to force a church to reinstate a defrocked bishop. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). The Court recognized that the "fallacy fatal to the judgment" of the state court was that it had "impermissibly substitute[d] its own inquiry into church polity and resolutions," when religious disputes are matters "for ecclesiastical and not civil tribunals." 426 U.S. at 708-09. The Court declared that "questions of church discipline and the composition of the church hierarchy are at the core of the ecclesiastical concern," and "not the proper subject of civil court inquiry." *Id.* at 717, 713. Significantly, the Court recognized that the First Amendment would be violated not merely by a court's reversal of a church's decision, but even by the intrusion of a "detailed review of the evidence," such as "evaluat[ing] conflicting testimony concerning

internal church procedures." *Id.* at 718. Any other rule would sanction judicial "intrusion into a religious thicket." *Id.* at 719.

The Court returned to this "entanglement" theme in the context of religious schools in *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979). In that case, the Court declined to interpret the National Labor Relations Act to give the National Labor Relations Board authority to force church-operated schools to engage in collective bargaining with their teachers because allowing such an "intrusion" "could run afoul of the Religion Clauses" of the First Amendment. *Id.* at 499. Recognizing both that "'religious authority necessarily pervades the [parochial] school system,'" (citing *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971)), and "the critical and unique role of the teacher in fulfilling the mission of a church-operated school," *id.* at 501, the Court concluded that "[w]e see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow." *Id.* at 504. Anticipating that schools would defend labor charges by responding that "their challenged actions were mandated by their religious creeds," and that courts would then be drawn into an examination of religious doctrine (the "detailed review of the evidence" and "evaluation of conflicting testimony concerning internal church procedures" prohibited by *Milivojevich*), the Court understood that "[i]t is not only the conclusions reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." 440 U.S. at 502.

As this historical review shows, for more than a century, the Court has protected religious freedom by prohibiting the courts from second-guessing a church's decision to appoint or remove a minister, or a church's interpretations on matters of religious faith and doctrine, including the manner in which the church passes on the faith to the next generation through church-operated schools. The Sixth Circuit's decision, and the primary duties test it employed, simply cannot be squared with the Court's teachings.

The Sixth Circuit entertained a suit challenging the removal—and demanding the reinstatement—of a commissioned minister, a matter this Court has recognized to be of prime ecclesiastical concern. In doing so, the circuit court sanctioned Perich's use of the courts to bypass the church's internal dispute resolution process regarding fitness for the ministry, a process of laying disputes before the "members of the brotherhood" which the church understood was mandated by religious doctrine and which Perich had agreed to use exclusively. The circuit court disregarded the church's own views as to the religious significance of Perich's duties and of her fitness for ministry. Substituting an "objective" clock-watching primary duties test that provided no deference to the church's views on matters of its own religious faith, the Sixth Circuit concluded that it could rule on the request for reinstatement of a commissioned minister and called teacher because although she indisputably performed important religious duties, she spent more time teaching the secular curriculum. The Sixth Circuit's narrow interpretation of the ministerial exception, if allowed to stand, would visit on religious organizations the

very intrusion on their autonomy that this Court has defended against for more than a century, while entangling the courts in "a religious thicket."

II. THE SIXTH CIRCUIT'S PRIMARY DUTIES TEST FAILS TO PROTECT CORE FIRST AMENDMENT FREEDOMS.

The Sixth Circuit's "primary duties" inquiry into whether the employee's "primary" function is religious or secular creates the very interference with Free Exercise and Establishment Clause rights that the ministerial exception was originally designed to avoid. The approach has two basic flaws.

First, courts are not competent to distinguish "religious" tasks from "secular" tasks, and they engage in impermissible entanglement when they attempt to do so. This problem is compounded because the inquiry has both quantitative and qualitative elements. Some tasks may take little time but may be considered of great religious importance by a particular church, and vice versa. See *Clapper v. Chesapeake Conference of Seventh-day Adventists*, No. 97-2648, 1998 WL 904528, at *7 (4th Cir. Dec. 29, 1998) (per curiam) (explaining that the quantity of time an employee spends on religious matters must be considered alongside "the degree of the church entity's reliance upon such employee to indoctrinate persons in its theology"). Judges are not equipped to assess the qualitative aspect of a minister's duties. *Cf. Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (criticizing balancing tests that require courts to compare items that are "incommensurate," such as whether a "particular line

is longer than a particular rock is heavy"). It is only too understandable, then, that courts will give greater weight to the quantitative analysis because that is within their grasp. See *Note, The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 Harv. L. Rev. 1776, 1776-89 (2008).

Second, the difficulty of applying the primary duties test leads to significant uncertainty for churches as they cannot know which of their employees will be covered by the ministerial exception, and which will not. As this Court has explained, such uncertainty can itself be a Free Exercise Clause violation:

> Nonetheless, it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 336 (1987). This uncertainty may lead to churches being overprotective and assigning tasks such as preaching and proselytizing to only one or two employees whom the courts will accept as "ministers," while

prohibiting those employees from engaging in tasks (such as service to parishioner's material needs) that a court might consider "secular," regardless of the importance of those tasks to the church's spiritual mission. When a church is forced to designate "ministers" based on litigation posture rather than spiritual needs, it has changed its core activities and its spiritual message to accommodate or protect against government pressures or expectations. *Cf. Wisconsin v. Yoder*, 406 U.S. 205, 217 (1972) (warning against "contemporary society['s] exert[ion of] a hydraulic insistence on conformity to majoritarian standards" on religious entities).

The Sixth Circuit's application of its "clock watching" ministerial exception illustrates both of these problems. Although the opinion acknowledged the dangers inherent in judicial interference with religious institutions' selection of employees, see *E.E.O.C. v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 777 (6th Cir. 2010) (explaining that the ministerial exception is "based on the institution's constitutional right to be free from judicial interference in the selection of those employees"), it suffers from a flat, one-dimensional perspective of a teacher's role in the spiritual formation of students by discounting the qualitative aspect of the religious instruction given. The panel instead focused on the minutiae of how many minutes Perich spent on religious or secular tasks to decide whether "the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." *Id.* at 778-79. The panel simply weighed

the "religious" time against the "secular" time, and found the religious side wanting. *Id.* at 780 ("[I]t is clear that Perich's primary function was teaching secular subjects."). The panel explicitly refused to give deference to the fact that the church considered Perich to be a "commissioned minister" and held her out as such to the community. *Id.* at 780-81. In criticizing the district court for having credited the church's designation, the panel explained that it was required to "objectively examine an employee's actual job function, not her title." *Id.* at 781. To the panel, this meant counting minutes, and specifically not considering the qualitative aspect.

In counting minutes, the panel lost sight of the larger, obvious truth: the mere fact that the teacher spent more minutes on all her other duties combined does not address the qualitative importance of her consistent daily religious instruction and worship to her students, their parents, or the school and church. Hosanna-Tabor considered Perich to be a commissioned minister and held her out as such to the community. Hosanna-Tabor's understanding was explicitly disregarded by the panel.

The record is clear that Perich was selected for her position at least in part for religious reasons and that she was given responsibility by her church to perform duties important to the religious mission of the church. She served as a "commissioned minister" and "called teacher" who was required to be trained for the ministry, taught religion classes, led students in prayer several times a day, led devotional exercises, and attended chapel services with her students each week. Even when teaching ostensibly

"secular" subjects, Perich was required by her church to "integrate faith into all subjects." Perich's testimony that she rarely incorporated religion into secular subjects and spent only 45 minutes per day on "religious" matters may show that she failed to perform her duties as required by the church, but it cannot answer the dispositive question of what the church considered her duties to be, and hence it cannot be a valid basis to require the church to defend before a secular court its decision to terminate her employment and ministry. Indeed, the Sixth Circuit's decision merely highlights the failure of the primary duties test to protect religious freedom. Regardless of the fact that she taught the full public school curriculum, Perich was selected to teach, inculcate and further the faith, and a secular court cannot adjudicate a challenge to the termination of her employment without violating and weakening the First Amendment. That the Sixth Circuit could reach the conclusion it did speaks volumes about the need to reject the test the Sixth Circuit employed.

The panel's decision also fails to provide certainty for religious entities in similar situations. If the primary duties test is allowed to stand, a church will not be able to rely on its own designation of ministers. Instead, it will have to predict how a federal judge, or a panel of judges, might characterize its employee's activities as religious or secular. The Court has recognized that such uncertainty burdens religious freedom. See *Amos*, 483 U.S. at 336 ("[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious.").

The primary duties test has been criticized for these failings. The original Ninth Circuit panel in *Alcazar* found the test "problematic" because the intrusive judicial analysis of each hour the employee spent on religious or secular duties "could create the very government entanglement into the church-minister relationship that the ministerial exception seeks to prevent," while "the underlying premise of the primary duties test—that a minister must "primarily" perform religious duties—is suspect" because "secular duties are often important to a ministry." *Alcazar v. Corp. of Catholic Archbishop of Seattle*, 598 F.3d 668, 675-76 (9th Cir. 2010), *reh'g en banc granted*, 617 F.3d 1101 (9th Cir. 2010) and *vacated in part, adopted in part*, 627 F.3d 1288 (9th Cir. 2010).[4] See also *Clapper*, 1998 WL 904528, at *7 (the quantity of time an employee spends on religious matters must be considered alongside "the degree of the church entity's reliance upon such employee to indoctrinate persons in its theology"). Moreover, the critical issue is not the tasks the employee performs but the meaning or religious significance with which the church endows those tasks under its own doctrine or creed. See *Schleicher v. Salvation Army*, 518 F.3d 472, 477-78 (7th Cir. 2008) (Thrift shops in the Salvation Army "have a religious function." "The sale of goods in a thrift shop is a commercial activity, on

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[4] On rehearing, the Ninth Circuit sitting *en banc* vacated Part IV-C of the original panel's opinion solely because "Rosas is a minister under any reasonable interpretation of the exception," and therefore "we need not and do not adopt a general test." 627 F.3d at 1290.

which the customers pay sales tax. But the selling has a spiritual dimension, and so, likewise, has the supervision of the thrift shops by ministers.").

Consider the hypothetical example of a homeless shelter operated by a local parish and staffed by lay Christian employees. Assume that the shelter's operations are indistinguishable from those of a non-religious social service center: serving meals, providing a warm place to sleep for the night, and offering job training and placement assistance. The employees do not engage in direct proselytizing. They need not even be of the same creed as the sponsoring parish. The church, however, considers the homeless shelter to be an attempt to fulfill a sacred duty to minister to the poor and fulfill a corporal work of mercy. See *Catechism of the Catholic Church* ¶ 1033 (Doubleday Religion, 2d ed. 1992) ("Our Lord warns us that we shall be separated from him if we fail to meet the serious needs of the poor and the little ones who are his brethren."); *Deuteronomy* 15:11 ("There will always be poor people in the land. Therefore I command you to be openhanded toward your brothers and toward the poor and needy in your land."). The hiring of compassionate Christian persons to "minister" quietly and conscientiously to the poor is therefore of critical importance to the parish. As the "embodiment of [the church's] message," *Petruska v. Gannon Univ.*, 462 F.3d 294, 306 (3d Cir. 2006), the church carefully selects these employees based, in part, on their acceptance of this mission. But if the employees were to bring an employment claim against the church, the Sixth Circuit's primary duties test would deny the parish the protection of the ministerial exception.

Instead, a court would be required to ignore the church's perspective on the employees' role because similar social services are provided in a similar manner by secular entities. If the First Amendment's protection of religious freedom is to be protected from erosion, Federal courts should not disregard the theological understanding of the church regarding its mission in the world and the role its ministers play in that mission. See *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1040 (7th Cir. 2006) (explaining how easily a court may be drawn into having to rule on a theological question); *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999) ("[C]hurches must be free "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine"); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1578 (1st Cir. 1989) ("Because of the difficulties inherent in separating the message from the messenger, a religious organization's fate is inextricably bound up with those whom it entrusts with the responsibilities of preaching its word and ministering to its adherents."); *E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 804 (4th Cir. 2000) (ministerial exception applied to musician who was the "primary human vessel through whom the church chose to spread its message in song"); *Van Osdol v. Vogt*, 908 P.2d 1122, 1126 (Colo. 1996) ("The choice of a minister is a unique distillation of a belief system. Regulating that choice comes perilously close to regulating belief.").

One should not make the perfect the enemy of the good. In rejecting the Sixth Circuit's test, however,

the Court has at its disposal two deferential tests which are demonstrably superior in avoiding unconstitutional entanglements with religious doctrine or infringements upon religious authority, and hence the erosion of religious freedom.

III. THE COURT SHOULD REJECT THE PRIMARY DUTIES TEST AND ADOPT A STANDARD FULLY PROTECTIVE OF THE IMPORTANT LIBERTIES AT STAKE.

Instead of the rigid Sixth Circuit test, this Court should adopt a standard that defers to the church's determination of whether and how an employee is important to the spiritual mission of the church, in the form of a rebuttable presumption. This kind of deferential test has significant advantages. Such a presumption would limit the risk of courts becoming entangled in religious questions because the rebuttable presumption would dictate that the church's articulation of the spiritual significance of the employee's role would generally control. To overcome the presumption, the court would require a clear showing that the church was a fake, or the title of "minister" was a sham, or that the employee's duties were misrepresented and the employee in fact performed no arguably religious duties. The presumption would avoid many difficult cases. Close cases would be governed by the presumption, increasing predictability.

Federal courts give deference in expressive association cases to the decisions of a group over its message. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000) ("[W]e must also give deference to an association's view of what would impair its

expression."). A church's selection of religious leaders to carry out its mission and transmit the faith to the next generation is at the intersection of the freedoms of religion and association, and is protected by both, as the Court recognized a century ago in *Watson*, 80 U.S. at 728-29, and reaffirmed in *Emp't Div. v. Smith*, 494 U.S. 872, 882 (1990) ("[I]t is easy to envision a case in which a challenge on freedom of association grounds would * * * be reinforced by Free Exercise Clause concerns."). See also *Amos*, 483 U.S. at 342 (Brennan, J., concurring) ("Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself.").

A deferential test does not mean abdication. Opposing parties can overcome the presumption by showing that the church's status or the title it bestowed are shams. See *Schleicher v. Salvation Army*, 518 F.3d 472, 478 (7th Cir. 2008). The church also has its institutional integrity to maintain and is accountable to its congregants and employees to operate in a forthright manner.

As a deferential standard, the Seventh Circuit's test in *Schleicher* is more protective of religious freedom, more predictable, and easier for courts to apply with less risk of entanglement than is the primary duties test. *Id.* at 478. In *Schleicher*, Judge Posner adopted "a presumption that clerical personnel" are covered by the ministerial exception that could be rebutted by proof that the employee's function is "*entirely* rather than incidentally

commercial." *Id.* (emphasis added). Such a rebuttable presumption minimizes the risk of entanglement while allowing cases to go forward where the employee has *no* religious function, so that the ministerial exception will not be subject to abuse. Returning to the homeless shelter hypothetical, see *supra* p. 22-23, the deferential test would lead to a different result than the Sixth Circuit test. The deferential test would respect the church's careful choice of employees and its understanding of the shelter's vital spiritual role.

Similarly, the Ninth's Circuit's now vacated[5] test in *Alcazar* is also more protective of religious freedom while minimizing the risk of entanglement. The original panel's test extended the ministerial exception where the employee was selected for the position "based largely on religious criteria" and "perform[s] *some* religious duties." *Alcazar*, 598 F.3d at 676 (emphasis added).

Both of these tests are superior to the Sixth Circuit's test because they take courts out of the constitutionally impermissible business of supplanting the judgment of religious leaders as to which of an employee's duties are most important and whether those so-called "primary" duties serve the faith. The Seventh Circuit's test is preferable because its presumption is more protective of religious freedom and avoids more elegantly the twin constitutional problems of the primary duties test.

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[5] See note 4, supra.

CONCLUSION

In the end, no test can answer every question with fidelity to the First Amendment if that test is applied in a rigid and insensitive manner. The nature of the dispute must always be considered; regardless of the employee's duties, a religious organization may have a religious basis for the termination of employment that is protected by the First Amendment. Whatever test they employ, the lower courts should be instructed to tread with caution and to consider carefully whether adjudicating the issues raised by the particular dispute will entangle the court in matters of faith. There may be no perfect single test that will easily answer all of the hard questions, but the primary duties test is far from perfect. The Court can come closer to the ideal with a more sensitive, flexible and principled test.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF *AMICUS CURIAE* OF TRINITY BAPTIST CHURCH OF JACKSONVILLE, INC. IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae, Trinity Baptist Church of Jacksonville, Inc.[1] is an independent Baptist Church that, in addition to the Church, operates numerous ministries including a school serving children from ages Kindergarten through 12th Grade, a seminary college, and a rescue mission for men, women, and children. The Church is organized as a charitable religious organization under the United States Code and regulations established by the Internal Revenue Service. Trinity Baptist Church hires employees to serve in various capacities to further its mission as a Christian Church. Each of Trinity Baptist Church's ministries is Christ-centered and Bible-based. All employees and volunteers are required to make a Profession of Faith that governs not just their employment but their lives as Christians.

The issue before the Court will have a direct and lasting effect on Trinity Baptist Church. Under First Amendment principles, Trinity Baptist Church has complete autonomy in its governance and in selecting who will "preach its values, teach its message, and interpret its doctrines both to its own membership

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[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than *Amicus Curiae* or its counsel made a monetary contribution intended to fund the preparation or submission of the Brief. The parties have consented to the filing of this brief.

and to the world at large." *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1167-68 (4th Cir. 1985). Yet, potential liability for claims brought by such ministers under general employment and civil rights laws such as Title VII of the Civil Rights Act of 1964 or the Americans with Disabilities Act, as in the case before the Court, dramatically affects Trinity Baptist Church's ability to select and retain such ministers. While Trinity Baptist Church maintains a non-discrimination policy, there are Biblical criteria the Church uses in selecting those who teach its message. The current state of legal jurisprudence regarding judicial inquiry into the employment relationship between ministers and their church, however, leaves churches such as Trinity Baptist Church with little to no guidance on how a court will apply the law in any given circumstance to any given employee. Accordingly, further clarification from this Court is necessary.

Trinity Baptist Church joins Petitioner in seeking reversal of the Sixth Circuit Court of Appeals in this case because for a teacher who is responsible for leading his or her class in prayer, assisting in worship services, and teaching religious doctrine to not be considered a minister undermines the very purpose of school based church ministries. For example, the Mission Statement for Trinity Christian Academy, a ministry of Trinity Baptist Church since 1967, states: "The mission of Trinity Christian Academy is to glorify God by providing students a Christ-centered, Bible-based education, by influencing them

for salvation, by instructing them in values for Godly living, and by providing a program of academic and extra-curricular excellence." Trinity Christian Academy is accredited by the Florida Association of Christian Colleges and Schools and the Southern Association of Colleges and Schools Council on Accreditation and School Improvement. As a result, its curriculum must meet certain academic standards in core subjects such as reading, language arts, mathematics, science, and history, among others. This certification and the teaching of such subjects do not diminish the Christ-centered, Bible-based education offered by the school or the function of the teachers to incorporate by teaching and example Christian principles in the classroom. In short, Trinity Christian Academy teachers are ministers of the church and serve as intermediaries between the church and their students.

Trinity Baptist Church seeks clarification from this Court on the proper standard to be applied when reviewing employment-based claims from individuals who served in a ministerial capacity. A minister is more than a tally of tasks performed during the work day, a job title, or a list of competencies listed on an employment evaluation. For example, a minister is someone who is charged as part of their duties and responsibilities with teaching and sharing the Church's message to the Church's membership and the world. To properly recognize such a minister, a "primary duties" test cannot be rigid or oversimplified while ignoring the purpose or function of the position

in furthering the Church's spiritual mission. Indeed, it is the Church who, in the first instance, is in the best position to determine who serves as a minister on its behalf.

The Court has the opportunity to clarify a large body of law that affects the central functioning of churches and other religious organizations and establish the criteria by which a trial court or federal agency such as the EEOC will evaluate who qualifies as a minister under the ministerial exception. Accordingly, *Amicus Curiae*, Trinity Baptist Church files this brief in support of Petitioner, Hosanna-Tabor Evangelical Lutheran Church and School, seeking reversal of the decision of the Sixth Circuit Court of Appeals.

SUMMARY OF ARGUMENT

The Free Exercise Clause of the First Amendment provides churches with a right to select its ministers without interference from governmental authorities. Church governance, including the selection of who ministers on behalf of the Church is *per se* a religious matter and beyond the jurisdiction of the courts, even under generally applicable employment law statutes such as the Americans with Disabilities Act.

When the lower appellate court determined that the ministerial exception to Title VII did not apply to Respondent, it utilized a purely quantitative

"primary duties" test. Courts using such a test exhibit a fundamental misunderstanding of what constitutes ministry because they focus exclusively on tasks they classify as either "religious" or "secular" with the "majority" often winning the day in determining who is and is not a "minister." The "primary duties" test ignores the importance of a religious school teacher charged with, among other things, teaching students religious doctrine and leading students in prayer and worship to the spiritual mission of the religious organization. By effectively ignoring the function or purpose of the position as connected to the spiritual mission of the church, the Sixth Circuit excessively entangled itself in a fundamentally religious matter and unduly restricted the Petitioner's free exercise of religion.

The correct analysis focuses on the function or purpose of the position and its relationship to the spiritual and pastoral mission of the church. This analysis focuses on the ultimate issue, whether the position is important to a church's mission. When the essential functions of a teacher's position require the teaching of religious doctrine and leading students in prayer and worship, the teacher is closely connected to the religious mission of the church and, therefore, is a minister under the First Amendment, exempt from the application of employment laws of general applicability.

In addition to a proper "function" analysis, *Amicus* recommends two additional safeguards to protect a church's free exercise rights and avoid excessive

government entanglement with religion. The first is that a church's designation of a position as ministerial or classification of job functions and duties as religiously important should be given deference and accorded a rebuttable presumption. The second is that court decisions on the application of the ministerial exception should be recognized under the collateral order doctrine and subject to an immediate appeal as a final order.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS A CHURCH'S RIGHT TO SELECT THOSE WHO TEACH AND DELIVER ITS MESSAGE TO ITS MEMBERS AND THE WORLD.

The First Amendment provides, in pertinent part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. Const. amend. I. The limitations of the First Amendment apply to the courts as well as to Congress. *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 460 (D.C. Cir. 1996) (citing *Kreshik v. St. Nicholas Cathedral of the Russian Orthodox Church of N. Am.*, 363 U.S. 190, 191 (1960)). In applying these protections and freedoms, this Court has "placed matters of church government and administration beyond the regulation of civil authorities." *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 346 (5th Cir. 1999).

This Court and the courts of appeals have "always safeguarded the 'unquestioned' prerogative of religious organizations to tend to 'the ecclesiastical government of all the individual members, congregations, and officers within the general association.'" *EEOC v. Roman Catholic Diocese, Raleigh*, 213 F.3d 795, 800 (4th Cir. 2000) (quoting *Watson v. Jones*, 80 U.S. 679, 728-29 (1871)). In protecting a church's right to self governance, this Court "has shown a particular reluctance to interfere with a church's selection of its own clergy." *Catholic Univ. of Am.*, 83 F.3d at 460 (citing *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 717 (1976)).

In considering matters of church governance concerning the selection of clergy, courts consistently hold that "[a] church must retain unfettered freedom in its choice of ministers because ministers represent the church to the people." *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 946 (9th Cir. 1999). "The right to choose ministers without government restriction underlies the well-being of religious community, for perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large." *Rayburn*, 772 F.2d at 1167-68 (citing *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)). The "determination of 'whose voice speaks for the church' is *per se* a religious matter." *Minker v. Baltimore*

Annual Conf., 894 F.2d 1354, 1356 (D.C. Cir. 1990). Accordingly, "selection and termination of clergy is a core matter of ecclesiastical self-governance not subject to interference by a state, . . . [and] the Free Exercise Clause guarantees [a religious organization] the freedom to decide to whom it will entrust ministerial responsibilities." *Pardue v. Ctr. City Consortium Sch. of the Archdiocese of Washington, Inc.*, 875 A.2d 669, 673 (D.C. 2005) (quoting *Heard v. Johnson*, 810 A.2d 871, 882 (D.C. 2002)).

To protect these rights, the "ministerial exception" to statutes such as Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and various state law claims was developed by the courts. *Roman Catholic Diocese*, 213 F.3d at 800. While not a complete bar to all employment related claims brought against religious organizations, "[t]he ministerial exception . . . operates to bar any claim, the resolution of which would limit a religious institution's right to select who will perform particular spiritual functions." *Petruska v. Gannon Univ.*, 462 F.3d 294, 307 (3d Cir. 2006). "Thus, where . . . a claim challenges a religious institution's employment decision, the inquiry is whether the employee is a member of the clergy or serves a ministerial function. If so, secular review is generally precluded." *Archdiocese of Miami, Inc. v. Miñagorri*, 954 So. 2d 640, 642 (Fla. 3d DCA 2007), *rev. dismissed, Miñagorri v. Archdiocese*, 958 So. 2d 1086 (Fla. 2008), *cert. denied*, 129 S.Ct. 936 (2009) (citing *Alicea-Hernandez v. Catholic Bishop of*

Chicago, 320 F.3d 698, 703-04 (7th Cir. 2003)). In applying this exemption, the courts "do not look to ordination but instead to the function of the position." *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 703 (7th Cir. 2003) (citing *Young v. The N. Illinois Conf. of United Methodist Church*, 21 F.3d 184, 186 (7th Cir. 1994); *see also Roman Catholic Diocese, Raleigh*, 213 F.3d at 801 ("Our inquiry thus focuses on 'the function of the position' at issue and not on categorical notions of who is or is not a 'minister'"); *Catholic Univ. of Am.*, 83 F.3d at 463 (finding "that the ministerial exception encompasses all employees of a religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral mission.").

In avoiding entanglement with church employment decisions concerning its ministers, the courts have stated clearly that they "cannot imagine an area of inquiry less suited to a temporal court for decision; evaluation of the 'gifts and graces' of a minister must be left to ecclesiastical institutions." *Minker*, 894 F.2d at 1357. "Any involvement by [the court] concerning [a church's] decision on this question constitutes an unprecedented and impermissible entanglement with religious authority." *Powell v. Stafford*, 859 F. Supp. 1343, 1349 (D. Colo. 1994) (citing *Houston v. Mile High Adventist Acad.*, 846 F. Supp. 1449, 1554-55 (D. Colo. 1994)). Accordingly, "Title VII is not applicable to the employment relationship between a church and its ministers." *Gellington v. Christian Meth. Episc. Church*, 203 F.3d 1299, 1301 (11th Cir. 2000) (citing

McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972); *see also Clapper v. Chesapeake Conference of Seventh-Day Adventists*, 166 F.3d 1208, 1998 WL 904528 (4th Cir. 1998) (finding ministerial exception precluded claim under ADEA); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007) (and cases cited therein) (finding ministerial exception precluded employment discrimination claims under Title VII, ADA, ADEA, and common law claims brought against religious employers); *Miñagorri*, 954 So. 2d at 643-44 (finding ministerial exception precluded claim under state whistleblower act); *Coulee Catholic Sch. v. Labor & Indus. Review Comm'n.*, 768 N.W.2d 868 (Wis. 2009) (finding ministerial exception precluded state law age discrimination claim).

II. THE "PRIMARY DUTIES" TEST APPLIED BY THE COURT BELOW UNDULY ENCROACHES ON A CHURCH'S FREEDOM TO SELECT ITS MINISTERS AND RESULTS IN INCONSISTENT DECISIONS.

The Sixth Circuit below applied what it dubbed the "primary duties" test. *EEOC v. Hosanna-Tabor Evangelical Lutheran Ch. & Sch.*, 597 F.3d 769, 778-80 (6th Cir. 2010). In doing so, the court focused exclusively on a list of tasks Respondent, Cheryl Perich, performed in teaching the children placed within her care, distinguishing between what *it* considered "religious" and what *it* considered "secular." The court then concluded that because "she

spent the overwhelming majority of her day teaching secular subjects using secular textbooks," or six hours and fifteen minutes out of a seven hour work day, Respondent was not a "minister." *Id.* at 781.

This purely quantitative approach ignored the importance of Respondent's role in "the spiritual and pastoral mission of the church." *Rayburn*, 772 F.2d at 1169. This fundamental error in the Sixth Circuit's analysis highlights the concern this Court has so often raised when courts attempt to distinguish between what is religious and what is secular. "The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment. . . ." *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977). "At some point, factual inquiry by courts or agencies into such matters [separating secular from religious training] would almost necessarily raise First Amendment problems." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 496 (1979) (quoting *Catholic Bishop of Chicago v. NLRB*, 559 F.2d 1112, 1118 (7th Cir. 1977)) (alteration in original).[2]

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[2] This necessarily raises the question of the EEOC's initial investigation of a charge of discrimination where the issue of the ministerial question is present. That issue is addressed more fully in Section III.B., *infra*.

Here, the lower court relied exclusively on the amount of time Respondent spent on certain "religious" tasks to the exclusion of whether those tasks were "important to the spiritual and pastoral mission of the church." Indeed, while noting the inherently religious nature of Petitioner, the court concluded that Respondent's religious duties were not "primary" because as a school teacher, Respondent necessarily spent even more time teaching subjects such as math, reading, science, music, gym, and others using what the court termed "secular textbooks." *Hosanna-Tabor*, 597 F.3d at 772-73. It is here where the court erred. The court's reasoning and conclusion ignored the clearly established fact that Respondent was important in teaching the faith to her students, an important part of Petitioner's mission as a religious institution. Indeed, she spent 45 minutes every day instructing students on religious matters. This approach ultimately creates "First Amendment problems" the Court counseled against in *Catholic Bishop of Chicago*, 440 U.S. at 496.

Initially, "[w]hile it may be that the majority of her duties were teaching 'secular' subjects, it does not follow that her 'primary duties' were secular for purposes of determining whether the ministerial exception applies." *Coulee Catholic Sch.*, 768 N.W.2d at 887-88. "[M]erely enumerating the duties of [Respondent's] job description, many under secular-sounding headings . . . tells us little about whether

her 'position is important to the spiritual and pastoral mission of the church.'" *Pardue*, 875 A.2d at 677. It is certainly no surprise that as a teacher, Respondent was expected to perform many tasks, some secular and some religious, in teaching at a fully accredited school. Still, she was a teacher at a religious school and charged with leading students in prayer, teaching them the tenants of the faith, and attending and leading chapel services. Such secular and religious activities "are inextricably intertwined in the school's mission and the [teacher's] role in fulfilling it." *Id.*

This is especially true here where the Respondent's role was instrumental and important to teaching religious doctrine and leading students in prayer and worship. If such essential functions of a religious school teacher's job are insufficient to qualify as a "minister" under this Court's First Amendment jurisprudence, then churches such as Petitioner and *Amicus* are significantly restrained in who they select to teach religious subjects to those children who attend its schools. *Amicus* would be forced to hire separate teachers solely dedicated to the teaching of religious subjects and leading children in prayer to be assured that its selection of those entrusted with that responsibility will not be second-guessed by the court.

In attempting to "wall off" "secular" subjects from "religious" ones, the court below took to its

conclusion and demonstrated the inapplicability of a metaphor that has no basis in the wording or intent of the First Amendment. This Court has "recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school." *Catholic Bishop of Chicago*, 440 U.S. at 501. By necessity, "[t]he church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school." *Id.* at 504. The conclusion of the court below is based "on the premise that teaching mathematics is secular. However, teaching 'secular' classes is not necessarily 'purely secular' in the context of religious schools." *Weishuhn v. Catholic Diocese of Lansing*, 787 N.W.2d 513, 518 (Mich. App. 2010) (*Weishuhn II*) (citing *Coulee Catholic Sch.*, 768 N.W.2d at 883-84). From looking at Respondent's duties, it is clear she was an important part in fulfilling the mission of Petitioner in offering a "Christ-centered education" by "reinforcing bible principals [sic] and standards." *Hosanna-Tabor*, 597 F.3d at 772.

Criticisms of the lower court's quantitative approach are numerous. Those criticisms begin by noting that the test is not to tally up the person's day into "secular" versus "religious" tasks, but to determine whether the person is necessary to "perform particular spiritual functions." *See Petruska*, 462 F.3d at 307. In *Coulee Catholic Sch.*, the Wisconsin Supreme Court "reject[ed] a primary duties test that

looks to see if the 'vast majority' of tasks are religious, or whether a majority of the employee's time is spent on quintessentially religious tasks. This narrow view does not . . . sufficiently respect the constitutional imperatives of the free exercise of religion." 768 N.W.2d at 882. The court also noted that a quantitative analysis "also serves to minimize or privatize religion by calling a faith-centered social studies class, for example, 'secular' because it does not involve worship and prayer." *Id.* Under the Sixth Circuit's approach, the state can scrutinize the hiring and firing of ministerial employees "so long as the [employees] are spending (presumably) 49 percent or less of their time or tasks on whatever the court determines to be 'religious' activities. This redounds in an intrusiveness inconsistent with the free exercise of religion." *Id.*

In addition to focusing on the wrong criteria, the test as applied by the court below leads to inherently inconsistent results. *See, e.g.*, Note, *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 HARV. L. REV. 1776, 1789-90 (2008) (and case examples cited therein). Indeed, the ruling before the Court is in direct conflict with findings in *Clapper* and *Coulee Catholic Sch. Compare Miñagorri*, 954 So. 2d at 643-44 (and cases cited therein holding when the ministerial exception was found to be applicable) *with Hosanna-Tabor*, 597 F.3d at 778-79 (and cases cited therein holding when the

ministerial exception was not found to be applicable). As such, under current court decisions, there is no reasonable means for a church to determine who is and is not covered by the ministerial exception.[3] Religious organizations are left guessing which

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[3] Given such inconsistent results, even the EEOC in exercising its investigatory responsibilities under Title VII and related statutes is left without guidance on who qualifies as a minister exempt from the application of these statutes. A review of the EEOC Compliance Manual addressing "Religious Discrimination" shows that the Commission provides almost no guidance to its investigators in resolving this issue before subjecting a religious institution to a full-fledged and invasive investigation into the reasons for its employment decision. In its discussion of the ministerial exception, the EEOC instructs its investigators: "The ministerial exception applies only to those employees who perform essentially religious functions, namely those whose primary duties consist of engaging in church governance, supervising a religious order, or conducting religious ritual, worship, or instruction." Equal Employment Opportunity Commission, *Directives Tranmittal* No. 915.003, July 22, 2008, at p. 20 (covering Section 12 of the new EEOC Compliance Manual on "Religious Discrimination"). Noticeably absent from the EEOC guidance are the "primary duties" of "teaching, spreading the faith," duties at the very heart of the controversy before this Court. *Compare with Rayburn*, 772 F.2d at 1169. Because the EEOC Compliance Manual gives no other guidance on how an EEOC investigator is to determine which positions are beyond scrutiny, statutorily mandated investigations risk the excessive entanglement this Court found violated the First Amendment in *Catholic Bishop of Chicago*, 440 U.S. at 496. Accordingly, the functions test, rebuttable presumption, and treatment of the "ministerial question" set out in Section III, *infra*, should guide the EEOC's inquiry when faced with such issues raised in relation to a pending charge of discrimination.

activities a court will find "religious" and which a court will find "secular" and then which duties are "primary" and which are "secondary."

> [I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 336 (1987).

Under the lower court's analysis, courts and the EEOC are put into a position to do precisely what the First Amendment precludes them from doing, resolving matters of ecclesiastical concern and church doctrine. *Alicea-Hernandez*, 320 F.3d at 703; *Gellington*, 203 F.3d at 1304. The problem with this should be obvious as the lower court's decision demonstrates why courts are ill-equipped to determine what ministry really is. *Amos*, 483 U.S. at 343-44 (Brennan, J., concurring). That is why the inquiry should focus "on the 'function of the position' at issue and not on categorical notions of who is or is not a 'minister.'" *Roman Catholic Diocese, Raleigh*, 213 F.3d at 801.

III. THE COURT SHOULD ADOPT A TEST THAT FOCUSES ON THE FUNCTION OF THE POSITION IN FURTHERING A CHURCH'S SPIRITUAL AND PASTORAL MISSION RATHER THAN ON A "PRIMARY DUTIES" TEST.

A. Test for Determining Who Is a Minister Should Focus on Whether Function of Position Is Important to Church's Spiritual and Pastoral Mission.

In *Rayburn*, the court noted that the key determination is "whether a position is important to the spiritual and pastoral mission of the church." 772 F.2d at 1169. Indeed, the very purpose of the ministerial exception is that it "operates to bar any claim, the resolution of which would limit a religious institution's right to select who will perform particular spiritual functions." *Petruska*, 462 F.3d at 307. Accordingly, any proper analysis must "focus[] on 'the function of the position' at issue and not on categorical notions of who is or is not a 'minister.'" *Roman Catholic Diocese, Raleigh*, 213 F.3d at 801. Ordination, of course, is not the standard. *Id.*; *see also Alicea-Hernandez*, 320 F.3d at 703.

To remain true to the First Amendment's requirement that churches be free from government intrusion into the selection of its ministers, *Catholic Univ. of Am.*, 83 F.3d at 460, *Amicus* recommends the Court look more to the function of the position and its connection to the overall mission of the religious organization rather than to a rote recitation of tasks

and the amount of time each takes to complete. Such a "functional" approach "is a more holistic approach" where "activities such as teaching . . . [and] participation in worship are relevant evidence as to the importance of the position to the spiritual and pastoral mission of a . . . religious organization. The primary concern here is the function of the employee, not only the enumerated tasks themselves." *Coulee Catholic Sch.*, 768 N.W.2d at 882.

> A functional analysis of the ministerial exception involves significantly less intrusion into the affairs of houses of worship and religious organizations. It envisages a more limited role for courts in determining whether activities or positions are religious. A functional analysis avoids reducing the significance of a position to a rote quantitative formula. In short, a functional analysis is truer to the First Amendment's protection of religious freedom.

Id.

Courts that have taken a more "functional" analysis versus a "primary duties" approach have considered two main issues. First, "the employer must be a religious institution," and second, "the employee must have been a ministerial employee." *Hollins*, 474 F.3d at 225; *see also Coulee Catholic Sch.*, 768 N.W.2d at 882-83; *Weishuhn v. Catholic Diocese of Lansing*, 756 N.W.2d 483, 499 (Mich. App. 2008) (*Weishuhn I*). Here, as acknowledged by the court below, there is no question Petitioner is a religious

institution. *Hosanna-Tabor*, 597 F.3d at 778. This leaves the only issue being the proper analysis for determining who is a ministerial employee.

The second step involves a review of the "position itself and the degree to which it is important and closely linked with [the church's] mission." *Coulee Catholic Sch.*, 768 N.W.2d at 889. To determine how important or closely linked the employee's position is to the mission of the church, a court is not limited to considering only "objective employment indicators such as hiring criteria, the job application, the employment contract, actual job duties, performance evaluations, [but also] the understanding or characterization of a position by the organization." *Id.* at 883. Rather, "quintessentially religious tasks will evince a close link and importance to an organization's religious mission." *Id.* Courts should look to the "total mix of circumstances" and the degree to which the church relies on the employee to carry out its religious purposes. *Clapper*, 1998 WL 904528 at *7. In these cases, "[t]he overriding theme is that the more pervasively religious the institution, the less religious the employee's role need be to risk First Amendment infringement." *Powell*, 859 F. Supp. at 1346.

In considering the function or purpose of a position, courts could utilize an analysis that already exists in employment law; the notion of "essential functions" of a job. *Amicus* contends that if an employee's "essential functions" consist of things such as "teaching, spreading the faith, church governance,

supervision of a religious order, or supervision or participation in religious ritual and worship," then the employee is a "minister" for First Amendment purposes. *Rayburn*, 772 F.2d at 1169. "[E]ssential functions 'are the fundamental job duties of a position that an individual . . . is actually required to perform.'" *Holly v. Clairson Indus., L.L.C.*, 492 F.3d 1247, 1257 (11th Cir. 2007) (quoting *Earl v. Mervyns, Inc.*, 207 F.3d 1361, 1365 (11th Cir. 2000) (per curiam)). Of course, there are many "essential functions" to a religious school teacher's position, but if one or more of the religious duties are important and closely linked with the spiritual mission of the religious organization, the teacher is a "minister" for First Amendment purposes. *Coulee Catholic Sch.*, 768 N.W.2d at 890 (holding, "[t]he state and federal constitutions do not permit the state to interfere with employment decisions regarding teachers . . . who are important and closely linked to the religious mission of" a religious organization).

In evaluating what job functions are "essential" under the Americans with Disabilities Act, courts consider factors such as: "(1) the employer's judgment as to which functions are essential; (2) the written job descriptions of the position; (3) the amount of time spent on the job performing the function; and (4) the consequences of not requiring the individual to perform the function." *Cremeens v. City of Montgomery, Ala.*, No. 10-14695, 2011 WL 2149918, at *2 (11th Cir. May 31, 2011) (citing 29 C.F.R. § 1630.2(n)(3)). Although not dispositive under the ADA, courts "give

substantial weight to the employer's judgment as to what functions of a position are essential." *Id.* This makes sense because under the ADA, Title VII and other employment discrimination statutes, courts have made it clear they do not "sit as super personnel departments" second guessing even a private employer's legitimate employment decision and should certainly not second guess a church's legitimate designation of someone as a minister. *Simmons v. Sykes Enter., Inc.*, No. 09-1558, 2011 WL 2151105, at *3 (10th Cir. June 2, 2011); *Lee v. City of Columbus, Ohio*, 636 F.3d 245, 258 (6th Cir. 2011); *Fischbach v. Dist. of Columbia Dept. of Corr.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996); *Alphin v. Sears, Roebuck & Co.*, 940 F.2d 1497, 1501 (11th Cir. 1991); *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1469 (11th Cir. 1991); *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987).

Other factors considered by courts include: "whether [the employee's] *duties* had religious significance," "whether [the employee's] *position* . . . entailed proselytizing on behalf of defendants," "whether that *position* had a connection to defendants' doctrinal mission," "whether that *position* was important to defendants' spiritual and pastoral mission," "whether [the employee's] *functions* were . . . related to worship," and "whether those *functions* were inextricably intertwined with defendants' religious doctrine in the sense that [the employee] was intimately involved in the propagation of defendants' doctrine and the observance and conduct of

defendants' liturgy by defendants' congregation." *Weishuhn I*, 756 N.W.2d at 500 (emphasis in original). When it comes to teachers at religious schools, this Court has recognized that such schools are often "an integral part of the religious mission of the" religious institution. *Pardue*, 875 A.2d at 675 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 615-16 (1971)); *see also Catholic Bishop of Chicago*, 440 U.S. at 501 (recognizing "the critical and unique role of the teacher in fulfilling the mission of a church-operated school"). Accordingly, when an employee's duties and responsibilities are so intertwined with the overall evangelical and teaching mission of the church and include the teaching of religious doctrine and leading students in prayer and worship, that employee is clearly one "whose voice speaks for the church," a *"per se* religious matter." *Minker*, 894 F.2d at 1357.

In this case, Respondent was responsible as part of her school day for leading children in prayer, teaching religion, and attending and even leading worship services. "[A]s a teacher of religion, she was involved in proselytizing on behalf of the church. . . . [E]ducating and indoctrinating the children was important to and furthered the purposes of the church." *Weishuhn II*, 787 N.W.2d at 518. The evidence here is overwhelming that Respondent was a "minister" for First Amendment purposes because "[a]ny one of these functions so embodies the basic purpose of the religious institution that state scrutiny of the process for filling the position would raise constitutional problems; when all functions are

combined, the burden of potential interference becomes extraordinary." *Rayburn*, 772 F.2d at 1168. In short, Respondent here "was not simply a public school teacher with an added obligation to teach religion. She was an important instrument in a faith-based organization's efforts to pass on its faith to the next generation." *Coulee Catholic Sch.*, 768 N.W.2d at 890.

B. Churches Should Be Given Deference in Determining Who Is a Minister with a Rebuttable Presumption Standard.

"The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern." *McClure v. Salvation Army*, 460 F.2d 553, 558-59 (5th Cir. 1972). Based on a long line of precedent from this Court, such matters "are beyond the purview of civil authorities." *Id.* at 559 (and cases cited therein). As the Fourth Circuit noted in *Minker*, "we cannot imagine an area of inquiry less suited to a temporal court for decision; evaluation of the 'gifts and graces' of a minister must be left to ecclesiastical intuitions. This is the view of every court that has been confronted by this genre of dispute." 894 F.2d at 1357. To avoid excessive government entanglement with a religious institution's designation of who serves as a minister, *Amicus* recommends that the Court find that such religious institutions be afforded

sufficient deference when it comes to determining who is and is not a "minister" "important to the spiritual and pastoral mission of the church."

In the context of the Americans with Disabilities Act, an employer's designation of essential job functions is given "substantial weight" even if such a designation is not dispositive of the issue. *Cremeens*, 2011 WL 2149918, at *2 (citing *Holly*, 492 F.3d at 1258). Religious institutions should be afforded no less deference. Indeed, because the issue concerns a matter "of prime ecclesiastical concern" such deference should take the form of a rebuttable presumption. *See Schleicher v. Salvation Army*, 518 F.3d 472, 477-78 (7th Cir. 2008) (finding church entitled to rebuttable presumption of ministerial designation under Fair Labor Standards Act).

The justification for a rebuttable presumption for a church's consideration of an employee as a minister is clear from this Court's prior decisions. As Justice Brennan noted in his concurrence in *Amos*:

> What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident. As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs. Furthermore, this prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. While a church may

> regard the conduct of certain functions as integral to its mission, a court may disagree. . . . As a result, the community's process of self-definition would be shaped in part by the prospects of litigation. A case-by-case analysis for all activities therefore would both produce excessive government entanglement with religion and create the danger of chilling religious activity.

483 U.S. at 343-44 (Brennan, J., concurring). Accordingly, some certainty needs to be built into the jurisprudence to give churches guidance on the scope and application of the ministerial exception and a safeguard to avoid an *ad hoc*, case-by-case analysis of "primary duties" that necessarily creates "an excessive government entanglement with religion."

A rebuttable presumption will limit the entanglement concerns inherent in an EEOC investigation into a charge of discrimination filed by a ministerial employee. *Gellington*, 203 F.3d at 1304 (quoting *Jones v. Wolf*, 443 U.S. 595, 603 (1979)); *Catholic Univ. of Am.*, 83 F.3d at 467; *Rayburn*, 772 F.2d at 1171. When coupled with the functions analysis above, a rebuttable presumption further protects against an overreaching governmental investigation by giving religious organizations the benefit of the doubt on who is a minister within an administrative review that is a condition precedent to court involvement. 42 U.S.C. § 2000e-5(b). Given the lack of guidance currently provided to EEOC investigators in how to resolve the ministerial exemption, *supra* note 3, clear

guidance from this Court is necessary to assist the EEOC in addressing a constitutional question that affects the applicability of Title VII to religious organizations. *Gellington*, 203 F.3d at 1301.

The EEOC has broad powers to investigate claims of employment discrimination, including subpoenaing witnesses and documents, 29 C.F.R. § 1601.16(a); requiring a fact-finding conference, 29 C.F.R. § 1601.15(c); requiring employers to maintain documents and submit reports directly to the EEOC, 42 U.S.C. § 2000e-8(c); requiring employers to make documents available for inspection and copying, 42 U.S.C. § 2000e-8(a); bringing a civil action to end unlawful discrimination, 42 U.S.C. § 2000e-5(f)(1); and even seeking preliminary injunctive relief while a charge remains pending. 42 U.S.C. § 2000e-5(f)(2). Religious organizations are entitled to protection from "not only the conclusions that may be reached by the [court or administrative agency] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusion." *Catholic Bishop of Chicago*, 440 U.S. at 502. Before the EEOC unleashes the full weight of its authority, there needs to be a determination of the ministerial exception based on proper criteria. Because the EEOC's dismissal of a charge on the basis of the ministerial exception is fully reviewable by a court, such a presumption in favor of a religious organization at the EEOC stage protects both the religious organization and the employee until a court can review the constitutional issue involved.

See 29 C.F.R. § 1601.18; 29 C.F.R. § 1601.28 (providing for a notice of right to sue and 90 days to file suit even if EEOC determines it lacks jurisdiction over the allegations in the charge).

This does not suggest that the EEOC should completely pass on making such a determination. However, a finding that the ministerial exception does not apply subjects a religious organization to an invasive inquiry into the reasons for its decision, an inquiry prohibited by the First Amendment for ministerial employees. Therefore, a presumption against such an inquiry is even more important at the agency investigation stage because there is little to no recourse for a religious organization to prevent a full investigation when the EEOC finds that an employee is not a minister.[4]

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[4] Because a religious organization is unable to seek injunctive relief from an EEOC investigation into a charge of discrimination by a ministerial employee, *see Catholic Archdiocese of Seattle v. EEOC*, No. C05-1298MJP, 2005 WL 2347094, at *3 (W.D. Wash. Sept. 26, 2005) (dismissing complaint and request for injunctive relief seeking to prohibit EEOC from investigating charge of discrimination against church or issuing a reasonable cause finding based on the church's failure to cooperate in investigation), such safeguards are even more important to retain an appropriate balance between the competing interests of eradicating employment discrimination and the free exercise of religion at the administrative investigation stage. *Rayburn*, 772 F.2d at 1169. A church is left with the options of refusing to cooperate in an investigation and having the EEOC issue a reasonable cause finding that may result in the EEOC initiating suit on behalf of the employee, moving to quash an EEOC subpoena, or waiting until a lawsuit is filed following the

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In addition to creating a legal standard that will provide safeguards at the administrative investigation stage, a rebuttable presumption would likewise strike an appropriate balance when the question is before the courts. Having a civil court determine what is and is not "ministerial" creates grave Establishment Clause concerns by having the courts substitute its notion of what is religious and what is secular for that of the church. *Amos*, 483 U.S. at 343-44 (Brennan, J., concurring).

The goal should be to limit the circumstances of when the EEOC and the courts evaluate the basis for a religious organization's employment decision. "[W]e cannot conceive how the federal judiciary could determine whether an employment decision concerning a minister was based on legitimate or illegitimate grounds without inserting ourselves into a realm where the Constitution forbids us to tread, the internal management of a church." *Combs*, 173 F.3d at 350. Of course, "the constitutional protection of religious freedom afforded to churches in employment actions involving clergy exists even when such actions are not based on issues of church doctrine or ecclesiastical law." *Gellington*, 203 F.3d at 1303

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issuance of a notice of right to sue. *See Catholic Archdiocese of Seattle*, 2005 WL 2347094, at *1. While this is not the best solution for serious constitutional questions, there are options at the charge level to avoid the EEOC's excessive entanglement in religious matters, especially if the safeguards requested in this Section III are implemented.

(citing *Combs*, 173 F.3d at 350)). While the court determines whether the employee is a "minister," it may not require the church to proffer some religious basis for its action. "This is because '[i]n quintessentially religious matters, the free exercise clause of the First Amendment protects the act of a decision rather than the motivation behind it. In these sensitive areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal intent.'" *Clapper*, 1998 WL 904528, at *6 (quoting *Rayburn*, 772 F.2d at 1169). To protect a church's unfettered right to select its ministers, a *per se* religious matter, a rebuttable presumption should be given to a church's designation of an employee as a "minister."

C. The "Ministerial Exception" Question Should Be Resolved First Before Permitting the Litigation to Move Forward.

Finally, when a court or agency is faced with determining the application of the ministerial exception, that issue should be resolved first and any court order denying the exemption's application should be subject to an immediate interlocutory appeal.[5] This Court has recognized several instances where a

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[5] For safeguards addressing an EEOC determination at the charge investigation stage, *see supra*, note 4.

"collateral order" should be considered a final order for appellate purposes under 28 U.S.C. § 1291. The Court has applied the collateral order doctrine to issues of immunity and appellate courts regularly review orders on class certification on an interlocutory basis. The rationale for an immediate review of such orders applies with equal force here and procedures already in place would facilitate the resolution of a fundamental constitutional question while safeguarding the protections and limitations of the First Amendment.

Issues of immunity have long been held to qualify for immediate interlocutory review because "immunity is 'an *immunity from suit* rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial.'" *Scott v. Harris*, 550 U.S. 372, 376 n.2 (2007) (emphasis in original) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)); *see also Martin v. Mem'l Hosp. at Gulfport*, 86 F.3d 1391, 1395 (5th Cir. 1996) (noting that issues of qualified and absolute immunity along with Eleventh Amendment immunity are subject to interlocutory appeal under collateral order doctrine); *Stewart v. Donges*, 915 F.2d 572, 574-75 (10th Cir. 1990) (finding denial of motion to dismiss indictment on grounds of double jeopardy subject to immediate appeal). This Court has "repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Scott*, 550 U.S. at

376 n.2 (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)).

The issue of a religious organization's immunity from suit under employment discrimination statutes based on the ministerial exception falls within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Johnson v. Jones*, 515 U.S. 304, 310 (1995) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). The issue falls squarely within the collateral order doctrine because it conclusively determines whether the court can decide the case, the issue of immunity is separate from the merits, and "appeal from final judgment cannot repair the damage that is caused by requiring the defendant to litigate." *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 755-56 (2d Cir. 1998) (finding immediate appeal on question of sovereign immunity justified because it was "immunity from trial and the attendant burdens of litigation").

Of course, the question of immunity in the context of the ministerial exception may require the trial court to make factual findings outside the four corners of the complaint. *Alicea-Hernandez*, 320 F.3d at 701. Nevertheless, the review of a factual record on

the narrow issue of the application of the ministerial exception does not make the question inappropriate for interlocutory review. Indeed, courts of appeal review highly factual determinations on an interlocutory basis as a matter of course in the area of class certification, a ruling that is often a mix of factual findings and legal conclusions.

"In litigation, a defendant may appeal a certification decision on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as well. Questions of law are reviewed *de novo* and questions of fact for clear error." *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1752 (2011); *see also Myers v. Hertz Corp.*, 624 F.3d 537, 547 (2d Cir. 2010). Indeed, courts have held that the certification process requires the court to make extensive factual findings that are reviewable on appeal. *Sher v. Raytheon Co.*, No. 09-15798, 2011 WL 814379, at *1 (11th Cir. March 9, 2011) (reversing class certification because the trial court failed to "sufficiently evaluat[e] and weigh[ ] conflicting expert testimony presented by the parties at the class certification stage"); *Fener v. Operating Eng'r Constr. Indus. & Misc. Pension Fund (Local 66)*, 579 F.3d 401, 406 (5th Cir. 2009) (noting that the court of appeals reviewed "the essentially factual basis of the certification inquiry").

The issue here would be less factually intensive than the class certification question courts of appeals currently review. Indeed, in the case before this

Court, the dispute is not about the essential functions of Respondent's job, but about her position's importance and connection to the spiritual mission of the church, an analysis that results in a legal conclusion reviewable by the appellate courts *de novo*. *See Clapper*, 1998 WL 904528, at *5 ("The existence of subject matter jurisdiction is a legal question, which we review *de novo*"); *Pardue*, 875 A.2d at 674-75 (holding that review of the ultimate conclusion of subject matter jurisdiction is reviewed *de novo* because issue was one of law); *Weishuhn II*, 787 N.W.2d at 517 (reviewing "*de novo* the trial court's decision on the ministerial exception because this issue is a question of law").

In *Coulee Catholic Sch.*, the Wisconsin courts considered the issue of the ministerial exception before the Equal Rights Division of the Wisconsin Department of Workforce Development could hold a hearing on the merits of the plaintiff's claim of employment discrimination. There, the Equal Rights Division, utilizing the same "primary duties" analysis employed by the Sixth Circuit in the case currently before this Court, found that the ministerial exception did not apply. It then ordered an evidentiary hearing on the merits of plaintiff's claim. 768 N.W.2d at 872-76. The school appealed to the Labor and Industry Review Commission which upheld that decision. The school then sought review in the state trial court and a writ of prohibition. Upon review, the

trial court and intermediate appellate courts both upheld the decision that the ministerial exception did not apply. Finally, the Wisconsin Supreme Court reversed. In doing so, it held that the standard of review was *de novo* for the constitutional issues, but that it would not substitute its judgment for that of the agency "as to the weight of the evidence on any disputed finding of fact." *Id.* at 878. It would, however, set aside any findings of fact not supported by the evidence. *Id.*

The standard of review for orders on the ministerial exception would be similar to other cases that come before the appellate courts on interlocutory appeal. Findings of fact would be accepted unless clearly erroneous, but legal conclusions, including the ultimate conclusion of whether the facts support a finding that the employee was a "minister," would be reviewed *de novo*.

Because the issue of immunity from suit is a legal question and subject to evidence beyond the allegations in the complaint, courts should follow the lead of the trial court in *Pardue* and limit discovery to the narrow issue of the exception until that issue is resolved. 875 A.2d at 671, 678 (finding trial court limiting discovery to the "role and position" of plaintiff and limited to interrogatories, document requests, and requests for admission only was reasonable). A trial court's inherent authority to control the scope

of discovery would allow it to address expeditiously and in the least intrusive manner the constitutional question presented which, if the ministerial exception is found to apply, would be dispositive of the case.

While the question before the Court obviously requires a balancing of interests, the fundamental principles found in the religion clauses of the First Amendment are those that must carry the day. "While an unfettered church choice may create minimal infidelity to the objectives of Title VII, it provides maximum protection of the First Amendment right to free exercise of religious beliefs." *Alicea-Hernandez*, 320 F.3d at 703 (quoting *Rayburn*, 772 F.2d at 1169). "Though its range of application is limited to spiritual functions, the ministerial exception to Title VII is robust where it applies. This protection is in keeping with the 'spirit of freedom for religious organizations [and] independence from secular control or manipulation' reflected in the Supreme Court's free exercise jurisprudence." *Roman Catholic Diocese, Raleigh*, 213 F.3d at 801 (quoting *Kedroff*, 344 U.S. at 116).

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the United States Court of Appeals for the Sixth Circuit and hold that the Respondent, Cheryl Perich's position fell within the First Amendment's "ministerial exception," which denies the court jurisdiction over Respondents' claim of retaliation under the Americans with Disabilities Act.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 10-553

In The Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF PROFESSOR EUGENE VOLOKH, NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE USA, BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY, QUEENS FEDERATION OF CHURCHES, NATIONAL ASSOCIATION OF EVANGELICALS, AND CHRISTIAN LEGAL SOCIETY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the ministerial exception applies to a teacher at a religious elementary school who teaches the full secular curriculum, but also teaches daily religion classes, is a commissioned minister, and regularly leads students in prayer and worship.

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I
INTEREST OF *AMICI CURIAE*[1]

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The **Christian Legal Society** ("CLS") is an association of Christian attorneys, law students, and law professors, with chapters in most states and at numerous law schools.

The **National Council of the Churches of Christ in the USA** ("NCC") is a community of 35 Protestant, Anglican, Orthodox, historic African American and Living Peace member faith groups which include 45 million persons in more than 100,000 local congregations. The NCC is an active defender of religious liberty, which it believes is served in the protection of the church's autonomy to select its religious leaders and teachers.

The **Baptist Joint Committee for Religious Liberty** serves 15 cooperating Baptist conventions and conferences in the United States, and is

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[1] The parties consented to the filing of this brief through consent letters filed with the Clerk of the Court. Neither a party nor its counsel authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission. Only *amici curiae*, their members, and their counsel made a monetary contribution.

supported by thousands of congregations across the nation. It focuses exclusively on the issues of religious liberty and the separation of church and state, and believes that vigorous enforcement of both the Establishment Clause and the Free Exercise Clause is essential to securing religious liberty for all Americans.

The **Queens Federation of Churches, Inc.**, is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. The Queens Federation of Churches believes that the congregation's selection of its own leaders and teachers is based on a call from God and may not, under religious liberty principles, be subject to regulation, definition or second-guessing by secular government.

The **National Association of Evangelicals** is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States.

SUMMARY OF ARGUMENT

This case is about the separation of church and state, an arrangement that is sometimes misunderstood and whose scope is debated, but which is nevertheless a critical dimension of the religious freedom reflected in, and protected by, the First Amendment to our Constitution. For nearly a thousand years, the tradition of Western constitutionalism and the project of protecting political freedom by marking boundaries to the power

of government have been assisted by the principled commitment to church-state separation, correctly understood. A community that respects – as ours does – both the importance of, and the distinction between, the spheres of political and religious authority is one in which the fundamental rights of all are more secure; a government that acknowledges this distinction, and the limits to its own reach, is one that will more consistently protect and vindicate the liberties of both individuals and institutions.

As we describe in this brief, the religious-freedom-protecting principle of church-state separation – from the time of Becket to Blackstone, to Benjamin Franklin, to today – has long meant, among other things, that religious communities and institutions enjoy meaningful autonomy and independence with respect to their governance, teachings, and doctrines. This autonomy has been recognized and vindicated in a long line and wide array of this Court's decisions, and is entirely consistent with the appropriate exercise of the civil authorities' regulatory powers.

The "ministerial exception," at issue in this case, is a clear and crucial implication of religious liberty, church autonomy, and the separation of church and state. Reasonably constructed and applied, the ministerial exception not only helps civil decision-makers to avoid becoming entangled in essentially religious questions; it also, and even more importantly, protects the fundamental freedom of religious communities to educate and form their members. Although this may prevent individuals in

some cases from suing for discrimination, it rests on the overriding principle that there are some questions the civil courts do not have the power to answer, some wrongs that a constitutional commitment to church-state separation puts beyond the law's corrective reach. The civil authority lacks "competence" to intervene in such matters, not so much because they lie beyond its technical or intellectual capacity, but because they lie beyond its jurisdictional power.

We propose an approach that is appropriately protective of the vital interests and values that are at stake. As we explain, the scope and application of the ministerial exception should be animated and guided by its purposes, by our historical experiences with disputes over the selection of religious leaders, and by the practical realities of litigation. The proposed approach is significantly, but not absolutely, deferential to religious organizations' characterization of their employees' duties as ministerial. Given our country's religious diversity, the wide variety of religious organizations and institutions, and the complexity of the modern regulatory state, a one-size-fits-all rule is neither necessary nor appropriate. In this case, the Court need not identify with precision or finality the exception's outer boundaries.

This case should be a straightforward and simple one, as it involves, without question, an employment position that is ministerial. Under the presumptive-deference approach we propose, a "called" Lutheran teacher with religious-education duties in a mission-oriented school integrating faith and learning is easily covered by the ministerial

exception. It should be remembered that at any point in time any given religious community is a mere generation away from extinction, and that teachers in religious schools are commonly on the front line of conveying the faith to children and forming them morally. Given our nation's deeply rooted commitments to religious freedom and church-state separation, an employment-related lawsuit in a civil court is not a permissible vehicle for second-guessing a religious community's decision about who should be responsible for keeping the next generation.

ARGUMENT

I. The Ministerial Exception Follows Directly From The Institutional Separation Of Church And State, A Deeply Rooted American Constitutional Tradition.

The separation of church and state is controversial in some of its applications, but there is long tradition and broad consensus in favor of at least institutional separation. The institutions of the state are distinct from the institutions of the church, and neither can exercise the functions of the other. The "establishment" of religion means not just sponsorship or financial support, but also "active involvement of the sovereign in religious activity." *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970). In this brief, *amici* elaborate on that principle and its implications for this case.

Over the centuries Western civilization has developed what Princeton historian John Wilson calls

the "two authority structure between church and state."[2] "[S]ince the fourth century Western civilization has presupposed that there are not one but two sovereigns. Each has a jurisdiction of legitimate operation, and while there are areas of shared cognizance, there are other subject matter areas in which each is noncompetent to perform the tasks of the other." Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. Rev. 1385, 1392. Thus, "when the civil state overreaches and performs a task within the sole province of the church, or misguided officials attempt to delegate an exclusive state function to the church, the boundary between church and state is transgressed." *Id.*

This differentiation between the institutions of church and state has become a part of the American constitutional tradition. Separation in this sense is an important First Amendment value. Americans have concluded that "[a] jurisdictional separation of the two authorities of church and state best facilitates healthy churches and a republic free of civil strife over religious doctrine." *Id.* at 1497.

Institutional separation of church and state means that the law may not delegate core governmental functions to churches. See, e.g., *Larkin v. Grendel's Den*, 459 U.S. 116, 126-27 (1982) (striking down delegation to churches of "discretionary

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[2] John F. Wilson & Donald L. Drakeman, eds., *Church and State in American History: Key Documents, Decisions, and Commentary from the Past Three Centuries* 10 (3d ed. 2003). See *id.* at 1-12.

governmental power" to reject an applicant for a liquor license). This case involves the complementary principle: Government may not insert itself into controversies over the ecclesiastical decisions of religious organizations, in particular disputes over the selection and supervision of ministers.

This Court has long recognized that a key component of religious freedom and church-state separation is the autonomy of religious organizations over matters of governance and doctrine. See *Watson v. Jones*, 80 U.S. 679, 728-29 (1872) (noting "unquestioned" right in America of "voluntary religious associations" to decide "controverted questions of faith" and matters of "ecclesiastical government"); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952) (holding that the First Amendment guarantees "a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine").

A religious organization's autonomy rests in both Religion Clauses of the First Amendment; in this area, the two clauses overlap and reinforce each other. This Court, in limiting government intervention into internal church disputes, has frequently relied simply on "the First Amendment" or "the Religion Clauses." See, e.g., *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724 (1976) ("the First and Fourteenth Amendments"); *NLRB v. Catholic Bishop*, 440 U.S. 490, 504, 499 (1979) ("the First Amendment"

and "the Religion Clauses"); *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449-51 (1969) ("the First Amendment"). In *Kedroff*, the Court held that a statute transferring institutional authority and property in the Russian Orthodox Church "violate[d] our rule of separation between church and state" as well as "the free exercise of religion." 344 U.S. at 110, 119. The Establishment Clause is equally relevant, for—as we discuss *infra* pp. 10-18—a common feature of establishments of religion was government interference with churches' choice of clergy, including those in the established church. This Court's Establishment Clause decisions speaking of church-state separation repeatedly emphasize that it protects religious communities as well as the body politic. See, e.g., *McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948) ("[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."); *Engel v. Vitale*, 370 U.S. 421, 429, 431, 435 (1962) ("[The Establishment Clause's] first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.").

In sum, the "separation of church and state" in our tradition "denote[s] a structural arrangement involving institutions, a constitutional order in which the institutions of religion . . . are distinct from, other than, and meaningfully independent of, the institutions of government." Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like*

the Boy Scouts?, 22 St. John's J. Leg. Comm. 515, 523 (2007).

The ministerial exception is just one manifestation of the tradition of institutional separation and institutional religious freedom. See Pet. Br. 15. But it involves a crucial principle in the tradition: government may not interfere with religious institutions in controversies concerning their selection and supervision of leaders and religious teachers.[3] The following two sections show: (A) that decisions over religious leadership have been central to the development of institutional church-state separation throughout Western history; and (B) the principle of institutional separation supports a strong ministerial exception.

A. A Crucial Component of Institutional Church-State Separation is that Government Should Not Interfere in Disputes over a Religious Institution's Selection and Supervision of Ministers.

The ministerial exception bars any lawsuit by an employee "the resolution of which would limit a religious institution's right to select who will perform particular spiritual functions." *Petruska v. Gannon*

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[3] The facts of this case do not involve a position subsidized with government funding. If it did, such funding would change the legal equation for some *amici*. For example, *amicus* Baptist Joint Committee objects to the use of government funding to subsidize positions restricted by religion, including any position to which the ministerial exception applies.

University, 462 F.3d 294, 307 (3d Cir. 2006); see *infra* pp. 19-23. By barring plaintiffs from seeking reinstatement or damages for alleged discrimination or from bringing similar claims, the exception prevents civil judges or juries from undermining religious institutions' ability to choose and supervise their leaders. This ability is of fundamental importance, as history and case law show.

1. The Historical Development of Religious Freedom and Disestablishment

The right of religious organizations to select and supervise their leaders has been vital to the development of institutional religious freedom. Virtually every major advance in that tradition has stemmed from some conflict over the government's intervention in this important area of decision-making.

The first such significant conflict in European civilization was the investiture controversy of the 11th and 12th centuries, in which popes and monarchs fought over who would have authority to appoint Catholic bishops. See Brian Tierney, *The Crisis of Church & State 1050-1300* (1964). Pope Gregory VII excommunicated German emperor Henry IV over the issue until Henry pleaded for forgiveness in a blizzard at the Pope's Alpine fortress of Canossa. The clash broke out again but was settled in 1122 by a compromise that left the church considerable power: "the emperor guaranteed that bishops and abbots would be freely elected by the church alone," although

he retained the right to invest them with their rights of temporal property. Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 98 (1983). In England, the famous conflict between King Henry II and Archbishop Thomas Becket, which culminated in Becket's murder, also stemmed from, among other things, the king's assertion of power to appoint bishops. See Leo Pfeffer, *Church, State & Freedom* 18 (rev. ed. 1967).

Because each side in these disputes prevailed only in a limited area—popes over spiritual offices, kings over temporal matters—the result was a "duality" of jurisdictions that "profoundly influenced the development of Western constitutionalism." Tierney, *supra*, at 2. "The very existence of two power structures competing for men's allegiance instead of only one compelling obedience greatly enhanced the possibilities for human freedom." *Id.* Although Gregory VII asserted broad papal supremacy over civil rulers, what he secured was "the independence of the church from secular control" in ecclesiastical matters like clergy selection. Berman, *supra*, at 87. This established the "principle that royal jurisdiction was not unlimited . . . and that it was not for the secular authority alone to decide where its boundaries should be fixed." *Id.* at 269; see Garnett, *supra*, at 524-25. Freedom to select religious leaders has been a landmark in the development of limited government in the West. By setting the precedent for limited government, institutional religious freedom has promoted political as well as religious liberty for all, believers and nonbelievers.

Early Protestantism, in struggling with the Catholic Church, often sought assistance from civil rulers, sometimes to the point of letting them control clergy selection and other important religious functions. In the Church of England, the most familiar example of an establishment to the American founders, the government appointed (and still appoints) the Archbishop of Canterbury and other leading clerics. See William Blackstone, *Commentaries on the Laws of England* ch. 11 (1979 ed.). English civil rulers exercised many other controls as well: the monarch was official head of the church and had the power to punish heresies, and Parliament enacted the Thirty-Nine Articles (the church's doctrinal tenets) and the Book of Common Prayer, requiring for many decades that most ministers pledge conformity to them. Michael W. McConnell et al., *Religion and the Constitution* 15 (2d ed. 2006).

In rejecting a national establishment of religion, Americans rejected any role for the federal government in choosing church leaders. The First Amendment simply confirms this renunciation. In 1783 the Vatican proposed an agreement with Congress to approve a Bishop-Apostolic for America now that the new states were outside English authority. Benjamin Franklin, who received the proposal as ambassador to France, replied that "'it would be absolutely useless to send it to the congress, which . . . cannot intervene in the ecclesiastical affairs of any sect.'" Anson Phelps Stokes, *Church and State in the United States* 478 (1950) (quotation omitted). The proposal triggered political opposition because

the bishop would be French, not American. Congress was urged to reject the appointment on that theologically neutral, "secular" ground. Instead it responded that it had "'no authority to permit or refuse'" the appointment, and the Pope could appoint whomever he wished, because "'[t]he subject . . . being purely spiritual, it is without the jurisdiction and powers of Congress.'" *Id.* at 479 (quotation omitted). This hands-off attitude toward the ministerial selections of any church "was of vital importance to all subsequent American history." *Id.*

Leading founding-era proponents of church-state separation understood it to protect religious institutions' autonomy, especially concerning clergy selection. Baptists and other dissenting groups who fought against religious establishments in New England and the southern colonies did so largely to preserve the autonomy of religious organizations from government interference and manipulation. Isaac Backus, the leading voice among Massachusetts Baptists, emphasized dual authorities in *An Appeal for Religious Liberty* (1773), which has been described as "the best exposition of the eighteenth century pietistic concept of [church-state] separation." William G. McLoughlin, *Isaac Backus and the American Pietistic Tradition* 123 (1967). According to Backus, "God has appointed two kinds of government in the world which are distinct in their nature and ought never to be confounded together": civil and ecclesiastical government. *An Appeal to the Public for Religious Liberty* (1773), reprinted in William G. McLoughlin, *Isaac Backus on Church, State, and Calvinism* 309, 312 (1968). From this distinction,

Backus directly drew implications concerning the appointment of leaders in each institution. The determination of the "offices of civil government is left to human discretion," but "in ecclesiastical affairs we are most solemnly warned not to be subject to ordinances after the doctrines and commandments of men." *Id.* at 313. God "has always claimed it as his sole prerogative to determine by express laws what his worship shall be, *who shall minister in it*, and how they shall be supported." *Id.* (emphasis added).

James Madison viewed the principle as forbidding government involvement in churches' internal affairs, especially clergy selection. His first recorded pronouncement on religion and government was an impassioned denunciation of colonial Virginia's licensing of preachers. Letter from James Madison to William Bradford, Jan. 24, 1774, in James Madison, *Writings* 5, 7 (Jack N. Rakove ed. 1999) (referring to the "diabolical Hell conceived principle of persecution"). In vetoing a bill specially incorporating an Episcopal church in the District of Columbia, President Madison objected that the bill enacted "sundry rules and proceedings relative purely to the organization and polity of the church incorporated, *and comprehending even the election and removal of the Minister of the same, so that no change could be made therein* by" the congregation or the denomination. Message to Congress, 27 Annals of Cong. 982-83 (Feb. 21, 1811) (emphasis added). For Madison, too, recognition of authority to choose clergy went hand in hand with recognition of religious autonomy.

Thomas Jefferson also saw church-state separation as guaranteeing church autonomy. In 1804, two years after his famous letter to the Danbury (Connecticut) Baptists endorsing a constitutional "wall of separation," Jefferson wrote another letter, this time to the Ursuline Sisters of New Orleans, who operated a school for orphaned girls. The order's prioress had written asking for assurance that the Louisiana Purchase would not undermine their legal rights. Jefferson replied: "[T]he principles of the constitution and government of the United States are a sure guarantee that [your property] will be preserved to you sacred and inviolate, and that your institution will be permitted to govern itself according to its own voluntary rules, without interference from the civil authority." Quoted in 1 Stokes, *supra*, at 678 (assuring that "your [institution] will meet all the protection which my office can give it"). Jefferson's powerful quote affirming institutional autonomy also encompasses the right of a religious school to select its own leaders, although it does not mention it explicitly.

State religious establishments, some of which continued after the First Amendment, included among their features control over the selection and conduct of clergy; and protests against such controls were essential to the successful fights for religious freedom and disestablishment. Under the establishments of religion in New England and the southern colonies, civil authorities regulated the conduct of clergy in the established church and at first prohibited, then licensed, religious teachers from dissenting sects.

Some regulations of preachers had explicitly theological criteria;[4] others, however, did not but nevertheless imposed serious burdens. For example, in Virginia, licenses only allowed named persons to preach in designated places—requiring multiple applications and seriously burdening the Baptist practice of itinerant teaching and evangelization. See H. J. Eckenrode, *Separation of Church and State in Virginia: A Study in the Development of the Revolution* 37-39 (reprint 1971) (1910); James, *supra*, at 13, 26-38, 41. In New England, controversies focused on whether dissenting clergy would be exempt from paying general taxes (as were Congregational clergy) and whether dissenting groups would be exempt from paying religious, i.e. clergy-support, taxes. Many Baptists and "separate" Congregationalists—both intensely evangelical groups—believed that personal religious conversion was more important for a preacher than professional training. William G. McLoughlin, *New England Dissent: 1630-1833* 351 (1971) (hereinafter *"NED"*). Contrariwise, establishment proponents believed that religious teachers should be professionally educated, and both Connecticut and Massachusetts reacted by passing laws in the mid-1700s "preventing any church or parish from choosing a minister who lacked a college degree." *Id.* at 363; see also Jacob C. Meyer, *Church and State in Massachusetts* 51 (1930). Such laws "embittered" Baptists and led them in 1773 to

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[4] For example, Virginia tried preachers in the 1720s for "speaking against the canons of the Church of England." Charles F. James, *Documentary History of the Struggle for Religious Liberty in Virginia* 13 (1900).

begin a "massive civil disobedience" campaign against religious taxes. 1 McLoughlin, *NED* at 546.

Finally, and significantly, the "death blow" to the Massachusetts establishment came because of distress at civil authorities overriding churches' choices concerning clergy. Sanford H. Cobb, *The Rise of Religious Liberty in America* 515 (1970 reprint) (1902). In this instance the issue arose from Massachusetts's rule allowing each local majority to determine which religious leader would receive the proceeds of clergy taxes (subject to dissenters' opt-outs). By the early 1800s, more and more Congregational parishes split between Trinitarians and the growing Unitarian movement. In several cases, one side constituted the majority in the church, the other the majority in the town (or "parish"). The Supreme Judicial Court ruled that the town's vote controlled which clergy member would occupy the "First Church" and receive tax funds. *Burr v. Inhabitants of First Parish in Sandwich*, 9 Mass. 277, 297-98 (1812); *Baker v. Fales*, 16 Mass. 488, 520-22 (1820).

In the key case, *Baker*, the majority of voters in the town of Dedham called a Unitarian minister, but the majority of church members objected and withdrew, taking records, liturgical materials, and trust funds with them. 2 McLoughlin, *NED* at 1190. When the court ruled that the town's vote—the civil determination—controlled, the previously dominant Trinitarians suddenly found themselves on the losing side. Within a few years they "conclude[d] that a religious establishment was no longer workable . . .

[and] that disestablishment was necessary to protect the church against the control of the nonchurched." Steven K. Green, *The Second Disestablishment: Church and State in Nineteenth Century America* 143 (2010). See 2 McLoughlin, *NED* at 1196 (*Baker* "produced the final and fatal crack in the [Massachusetts establishment].")

Under *Baker*, "the secular (non-members) citizens could overrule the communicants (the members) of the church. This was the system of Erastianism from which the original Puritan founders of Massachusetts had fled to the New World—the state as superior to the church." William G. McLoughlin, *Soul Liberty: The Baptists' Struggle in New England, 1630-1833* 299 (1991). As we will elaborate, the ministerial exception aims to prevent the very same harm: a civil body, jury or judge, overruling the selection of minister made by the religious organization's authorities.

2. This Court's Decisions

Given the importance of clergy selection in our tradition of religious institutional autonomy, it is unsurprising that this Court has repeatedly forbidden the government from interfering in religious institutions' decisions concerning the selection and supervision of leaders. *Kedroff*, 344 U.S. 94, invalidated a state statute that transferred authority and property in the Russian Orthodox Church from the Moscow Patriarch to an American convention. The Court held that the state had trespassed on "strictly a matter of ecclesiastical government": "the

power of the Supreme Church Authority of the Russian Orthodox Church to appoint the ruling hierarch of the archdiocese of North America." *Id.* at 115. Likewise, *Milivojevich*, 426 U.S. 696, invalidated a state court decision that overturned the Serbian Orthodox Church's defrocking of its American bishop. This Court held that civil courts must accept the decision of a hierarchical church's tribunal in "disputes over the government and direction of subordinate [church] bodies," *id.* at 724-25, including clergy selection and discipline. Finally, *Gonzalez v. Catholic Archbishop*, 280 U.S. 1 (1929), states that "[b]ecause the appointment [of a Catholic chaplain] is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them." *Id.* at 16 (secular courts must accept "decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights").

B. The Ministerial Exception Follows Directly from the Principle that the State May Not Interfere in Decisions Concerning the Selection or Supervision of Ministers.

The ministerial exception follows directly from the principle that religious organizations should control the selection and discipline of ministers. The exception bars any claim by an employee "the resolution of which would limit a religious institution's right to select who will perform particular spiritual functions." *Petruska*, 462 F.3d at

307; *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008).[5] Unquestionably, a nondiscrimination suit seeks to override the church's decision concerning such ministerial personnel. The threatened government action is especially intrusive when the plaintiff seeks a court order reinstating her to the position—the "presumptively appropriate remedy" under Title VII (*Rweyemamu v. Cote*, 520 F.3d 198, 205 (2d Cir. 2008)), and one that Perich sought here. In that case the court is literally appointing a minister. But an award of damages (including back pay, emotional-distress, punitive damages and attorney's fees) is also highly burdensome; it operates as a tax on protected decisions concerning ministerial personnel. As this Court has recognized, "[f]ear of potential liability [for employment discrimination] might affect the way an organization carried out what it understood to be its religious mission." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987).

Ministerial-exception decisions recognize why selection of leaders has historically been so sensitive for religious organizations:

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[5] The absolute bar to liability erected by the ministerial exception applies to lawsuits between the minister and the religious organization; the essence of these cases is a dispute over the organization's right to select ministers. In some other cases, by contrast, a religious organization's selection or supervision of ministers comes into question only as a secondary issue in a suit by a third party: for example, in suits seeking to hold the organization liable for acts of abuse committed by one of its ministers. This Court need not say anything regarding the appropriate standard for liability in third-party suits concerning ministers' conduct.

> A minister is not merely an employee of the church; she is the embodiment of its message. A minister serves as the church's public representative, its ambassador, and its voice to the faithful. Accordingly, the process of selecting a minister is *per se* a religious exercise. As the Fifth Circuit explained: "The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose." "Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern."

Petruska, 462 F.3d at 306 (quoting *McClure v. Salvation Army*, 460 F.2d 553, 558-59 (5th Cir. 1972)).

Like religious institutional autonomy in general, see *supra* pp. 7-9, the ministerial exception rests on both Religion Clauses. The first ministerial-exception case, *McClure*, held that application of nondiscrimination laws violated the Free Exercise Clause. 460 F.2d at 560. But it added that even the process of court intervention and investigation "could only produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment." *Id.* See Pet. Br. 29-32 (cataloging cases relying on free exercise and nonestablishment).

As petitioner argues, one ground for the ministerial exception is that nondiscrimination suits will frequently call on civil courts to make essentially theological judgments about whether the plaintiff was suited for a religious leadership role or performed it well. See Pet. Br. 29-31. Nondiscrimination suits typically turn on questions of "pretext": the employer asserts that it discharged the plaintiff for a nondiscriminatory reason, and the plaintiff challenges that reason as a pretext for discrimination. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973). In cases involving personnel with important religious functions, the organization's asserted nondiscriminatory motive will usually be religious in nature or have religious implications. To decide whether the organization's assertion of a religious motive is credible, judges and juries inevitably will have to examine it closely; they will have to second guess "[a] church's view on whether an individual is suited for a particular clergy position." *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1304 (11th Cir. 2000); see also Pet. Br. 52-58 and cases cited therein.

The court of appeals found this concern was inapplicable here: "Perich's claim would not require the court to analyze any church doctrine; rather a trial would focus on issues such as whether Perich was disabled within the meaning of the ADA, whether Perich opposed a practice that was unlawful under the ADA, and whether Hosanna-Tabor violated the ADA in its treatment of Perich." Pet. App. 24a. But that argument fails—and the ministerial exception remains applicable—for at least three reasons.

1. First, the ministerial exception is not designed merely to keep courts from deciding contested theological questions. The exception protects the distinct interest that religious organizations are free to choose their leaders. The question who will give spiritual leadership to the organization is a "matte[r] of church government," *Kedroff*, 344 U.S. at 116—of "prime ecclesiastical concern," *McClure*, 460 F.2d at 559—whether or not a civil court's interference includes an explicit theological ruling. If a court reinstates a minister over the church's objection or imposes a damage award for the church's decision, the result is no less harmful because it comes from the application of a doctrinally neutral rule. For this reason, most courts applying the ministerial exception hold that it is not contingent on the church identifying a rationale in "church doctrine or ecclesiastical law" for its employment action. See *Petruska*, 462 F.3d at 307; *id.* at 304 n.7 (ministerial exception "protects the act of a decision rather than a motivation behind it") (quoting *Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985)); see also Pet. Br. 24-25 and cases cited therein; Thomas C. Berg, *Religious Organizational Freedom and Conditions on Government Benefits*, 7 Geo. J. L. & Pub. Pol'y 165, 172-76 (2009).

Case law confirms that government interference with clergy decisions is barred independent of the presence of theological questions. See *Employment Division v. Smith*, 494 U.S. 872, 877 (1990) (state may not intervene "in controversies over religious authority or dogma") (emphasis added);

Watson, 80 U.S. at 733 (barring civil courts from matters of "ecclesiastical government" as well as "theological controversy").

As the history in part I-A shows, government can trigger the harms that the Religion Clauses seek to avoid—coercion, division, government overreaching—simply by overriding a church's decision on who is suitable to be its minister. Under the Massachusetts voting scheme for clergy taxes (see *supra* p. 17), the majority of town voters did not need to state a theological rationale for selecting one clergyman for the "First" church; they could choose based on any factor. Nevertheless the distress caused when town voters overrode church members' wishes was enough to end the Massachusetts establishment. Both Virginia's limit on the number of places where a minister could be licensed to speak (*id.* at 16) and Massachusetts' requirement of college training for ministers (*id.*) were formally neutral among theologies and called for no doctrinal determination. Nevertheless Virginia's jailing of unlicensed itinerant preachers provoked Madison to charge "persecution," (*id.* at 14) and the Massachusetts education requirement embittered the Baptists enough to drive them into "massive civil disobedience." *Id.* at 17.

2. In addition, even if the government claims to rest on religion-neutral principles in overriding a church's choice of minister, this claim frequently turns out to be wrong. Indeed, questions that might seem facially nonreligious take on a religious coloration in a dispute between a religious

organization and one of its ministers. Again, case law and history teach this lesson.

For example, in *Milivojevich* the Illinois Supreme Court, in overturning the bishop's defrocking, had "relied on purported 'neutral principles' . . . which would 'not in any way entangle this court in the determination of theological or doctrinal matters.'" 426 U.S. at 721 (quotation omitted). Nevertheless, this Court found, the state court entangled itself in religious questions by "substitut[ing] its interpretation" of the church's constitutions "for that of the [church's] highest ecclesiastical tribunals." *Id.* The pattern repeats throughout history. Requiring college education for ministers could be defended as a theologically neutral means to ensure formal schooling behind their preaching. But in practice it implicated the deep division between Congregationalists and Baptists over the relative importance of formal learning and personal religious experience.

This case exemplifies how theological or religious issues are almost impossible to avoid in cases involving employees with spiritual duties. When Hosanna-Tabor School declined to let Perich return from her leave in the middle of the school semester, she responded by threatening to sue and behaving in other ways that the principal regarded as confrontational. The school believed that her behavior violated New Testament injunctions against resorting to civil courts in disputes among Christians, and that she had "'create[d] upheaval at our school'" and shown "'a total lack of concern for the ministry of

Hosanna-Tabor Lutheran School.'" See Pet. Br. 10 (quotations omitted). A majority of the sponsoring congregation agreed and rescinded her call. Perich claims that these reasons are pretexts for discrimination, but in doing so she asks the courts to delve deep into religious issues. As petitioner notes, the pretext inquiry "would necessarily devolve into an investigation of the Church's beliefs. Do Lutherans really believe in non-litigious, internal resolution of disputes over fitness for ministry? Does that teaching apply to this case? Did it actually motivate the congregation?" Pet. Br. 56.

Ultimately, the church congregation terminated Perich's commission because, given her behavior surrounding the request to return, it had lost confidence in her ability to represent the school's purposes to children. If she were reinstated, every parent and every child would know she had defied Lutheran teaching to get there. Given those circumstances, it is hard to see how she could be an effective "voice to the faithful" on the Church's behalf (*Petruska*, 462 F.3d at 306). More fundamentally, it is up to the Church, not a jury or judge, to decide whether she could be effective.

3. Finally, the ministerial exception protects against the burdens of litigation and investigation, independent of the results. As this Court stated in refusing to extend federal Labor Board jurisdiction to parochial-school teachers: "It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading

to findings and conclusions." *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979). If nondiscrimination suits were permitted to proceed, "[c]hurch personnel and records would inevitably become subject to subpoena, discovery, cross-examination, the full panoply of legal process designed to probe the mind of the church in the selection of its ministers." *Rayburn*, 772 F.2d at 1171 (combination of EEOC investigation and federal lawsuit makes for "potentially . . . lengthy proceeding"); *EEOC v. Catholic University*, 83 F.3d 455, 466-67 (D.C. Cir. 1996). Religious organizations not only suffer direct burdens from such expense and scrutiny; they also "might make [decisions] with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments of who would best serve the pastoral needs of their members." *Rayburn*, 772 F.2d at 1171. See *Amos*, 483 U.S. at 343-44 (Brennan, J., concurring) (Title VII litigation may "both produce excessive government entanglement with religion and create the danger of chilling religious activity").

II. Properly Defined, The Ministerial Exception Extends To Teachers With Religious Duties In Religious Schools.

A. The Scope of the Exception Should Be Broad, to Include Employees with Duties of Church Leadership or of Teaching the Faith, as the Religious Organization Defines Them.

The scope of the ministerial exception should be informed by the purposes of the exception, the history of disputes over the selection of religious leaders, and the practical realities of litigation.

1. As a basic definition, *amici* propose that "ministerial" employees are those with duties to lead the religious organization, teach the faith, or participate in the spiritual or moral formation of community members. Clergy status or formal ordination status, although evidence that the plaintiff falls within the exception, should not be requirements.

More specifically, the duties of leadership or religious teaching include one or more of the following: (a) formation or declaration of doctrine; (b) conducting communal worship, ritual, or prayer, including music integral to worship; (c) teaching or instruction in the faith, especially of children and converts; (d) evangelism or outreach to those outside the religion; (e) discipline of wayward clergy or laity; (f) counseling the troubled or the spiritual inquirer, including confession or restoration following

discipline; (g) the selection or promotion of such leaders and teachers; and (h) at the level of policy formation, those administering the organization when decisions are material to the definition, operation, growth, or continued existence of the religious organization. See *Rayburn*, 772 F.2d at 1169 ("clergy" duties include "'teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship'") (quotation omitted).

2. The exception should be defined broadly, with presumptive deference to the organization's understanding of an employee as a religious leader or teacher. Religious organizations have multiple ways of structuring themselves and characterizing their leaders. Some emphasize ordination, others rely heavily on lay leadership as well, and some (such as Quakers) have no clergy whatsoever. In some organizations the pastor is crucial, in others the teacher. The history in part I-A (*supra* pp. 10-18) shows that narrow or formalistic civil definitions of ministerial status have excluded some groups and triggered dissension. Narrow definitions encourage excluded organizations to change their structure and self-understanding, relabeling positions in order to fit within the exception. This undermines the ministerial exception's purpose of preserving churches' control over matters of governance and administration (see *supra* pp. 19-22). The exception can only achieve that purpose if its coverage is defined deferentially.

Presumptive deference to the organization also reduces the chilling and burdensome effects of investigation and litigation. The ministerial exception is designed to avoid such entanglements (see *supra* p. 24-27); courts should not reintroduce them in the very act of determining whether the exception applies. Second-guessing by judges and juries of an employee's "ministerial" status may chill organizations' decisions just as much as second-guessing of what is "religious." *Amos*, 483 U.S. at 336; see *id.* at 343-44 (Brennan, J., concurring). The organization should not be deterred by the prospects of litigation from making decisions about the suitability of an employee who performs religious functions but who a jury may not regard as a minister. See *Rayburn*, 772 F.2d at 1171. Moreover, because presumptive deference increases the likelihood that the ministerial exception will apply, it reduces the prospective burdens of litigation itself (cf. *Catholic Bishop*).

If the organization shows evidence that the plaintiff has one of the duties above (see *supra* pp. 28-29), the presumption of ministerial status should apply. (In part II-B, *infra* pp. 32-38, we define the presumptions of ministerial status applicable to teachers in religious schools.) Presumptions can be overridden, of course. *Amici* suggest that various presumptions of "ministerial" status may be overridden if the plaintiff presents clear and convincing evidence that the status should not apply, either because the plaintiff does not in fact have such duties or because the duties are *de minimis*. See *infra* pp. 36-37. The "clear and convincing" evidentiary

burden has long operated in another, familiar context where civil lawsuits threaten First Amendment values. Defamation suits by public officials or public figures are barred unless the plaintiff proves by clear and convincing evidence that the defendant's false statements were made knowingly or recklessly. *Masson v. New Yorker Magazine*, 501 U.S. 496, 510 (1991); *New York Times v. Sullivan*, 376 U.S. 254, 279-80, 285-86 (1964).

3. Presumptive deference to the organization has several implications. The first concerns the relevance of the plaintiff's holding an ecclesiastical title or office. Such a status should create a strong presumption that the employee falls within the exception. But of course, an ecclesiastical office or title should not be a requirement. Making it a requirement would, again, exclude some religious groups based on their polity and encourage them to give their leaders formal offices in order to fit within the exception, even though the designations do not fit the organization's self-understanding.

An approach that errs on the side of liberty to choose ministers is also inconsistent with the court of appeals' conclusion in this case, which relied on a rigidly quantitative approach to determine that Perich's "primary duties" were not religious. Pet. App. 20a. An employee should be covered if teaching religion or leading religious activity—religion classes, group prayer, chapel, or devotionals—are important aspects of her job. They may be important aspects qualitatively even if they do not take up the majority of the employee's time. See Pet. Br. 37-41.

4. Of course, the definition of "ministers" has limits. Not all employees are covered by the exception even if they are generally expected to observe religious standards or model religious behavior. The employee must have responsibilities for leadership, teaching of the faith, or spiritual and moral formation of community members. Moreover, not every kind of lawsuit by a religious leader implicates the exception. If a clergyperson slips and falls on the church stairway, she can sue the church under tort or workers' compensation laws, because—unlike a nondiscrimination suit—the claim has no effect on the church's ability to select ministers or set standards for their conduct.[6]

B. The Exception Covers Teachers with Religious Duties in Religious Schools.

Applying these standards, teachers with religious duties in religious elementary and secondary schools should fall within the ministerial exception. At the very least, a teacher should fall within this category if she has undergone theological training and an ordination or commissioning process, or if she teaches children the faith in a religion class. Perich did both—which makes this an easy case. Such designation or activities alone put the plaintiff in the category of religious leader/teacher, at least unless

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[6] Although claims by ministers under the minimum-wage laws do not directly affect an organization's ability to select its leaders, courts have still applied the exception on the ground that "matters of church administration and government [include] a minister's salary, his place of assignment and his duty." *McClure*, 460 F.2d at 560; *Schleicher*, 518 F.3d at 477.

the plaintiff can prove clearly and convincingly that the designation was "a sham." See Pet. Br. 49 (citation omitted) (arguing that there is no evidence to undercut Perich's designation as a commissioned minister).

This case, however, by no means exhausts the circumstances in which religious school teachers should be considered ministers. Both the teaching of the faith and the spiritual and moral formation of children support designating many teachers as ministers.

Many schools emphasize that teaching the faith occurs throughout the curriculum, even in subjects that an observer might call "secular." For example, the Association of Christian Schools International ("ACSI") believes that "[t]he biblical integration of every planned learning experience is crucial to effective Christian schooling" (ACSI Core Beliefs, http://www.acsi.org/tabid/535/itemid/3113/default.aspx) (last visited June 19, 2011)) and that faculty among other personnel should be "teaching and leading from a biblically integrated perspective." ACSI, Elements of Effective Schools, http://www.acsi.org/tabid/535/itemid/77/default.aspx (last visited June 19, 2011). Catholic school systems also pursue this integration: as a school handbook quoted by this Court put it, "'[r]eligious formation is not confined to formal courses; nor is it restricted to a single subject area.'" *Lemon v. Kurtzman*, 403 U.S. 602, 618 (1971) (quoting Catholic school handbook). Hosanna-Tabor School fit this model too, since it encouraged teachers to be "'Christian role models who

integrate faith into all subjects'" (Pet. App. 5a, 35a; Pet. Br. 42)—yet another reason to treat Perich as a minister.

The category of spiritual or moral formation is also particularly relevant to religious school teachers. In many such schools, teachers are expected to handle discipline issues throughout the day, which necessarily involves implementing the school's religious viewpoints on right and wrong, grace, obedience to authority, human nature's essential goodness and/or sinfulness, and behaviors that exhibit good and bad character as defined by the faith. Such disciplinary conduct is an unavoidable component of any elementary or secondary schoolteacher's job—regardless of the subject she teaches, and regardless of whether the subject matter explicitly incorporates religious content. A math teacher who simply communicates algebra and geometry concepts, without theological comment, may nevertheless have a vital, daily spiritual role through how she imposes discipline. This responsibility is a primary means of conveying to children what the religious faith holds to be good and bad in personal conduct. See, e.g., *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 19 n.3 (1993) (Blackmun, J., dissenting) (religious school's faculty employment agreement required teachers "to assist in the implementation of the philosophical policies of the School, and to compel proper conduct on the part of the students in the areas of general behavior, language, dress and attitude toward the Christian ideal.")

Likewise, teachers often play crucial roles in counseling students on personal issues of religious significance. In the schools in *Lemon*, for example, "the Handbook advise[d] teachers to stimulate interest in religious vocations and missionary work." 403 U.S. at 618.

Teachers who transmit the faith and help form children spiritually and morally epitomize the functions that the ministerial exception was developed to protect. By teaching and guiding children, they act as the religious group's "voice to the faithful" (*Petruska*, 462 F.3d at 306; *McClure*, 460 F.3d at 558)—as well as its "lifeblood" (*id.*), since every religious community is only a generation away from extinction and must transmit its beliefs to the young. Teachers' central role in religious schools confirms that they are "the chief instrument by which the [school] seeks to fulfill its purpose" (*id.* at 559).

In *Catholic Bishop*, this Court "recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school" as the predicate for concluding that government intervention in the teacher-school relationship would create serious First Amendment risks. 440 U.S. at 501. Earlier, *Lemon* had documented the importance of teachers, quoting the handbook for Rhode Island Catholic schools: "'The prime factor for the success or the failure of the school is the spirit and personality, as well as the professional competency, of the teacher . . .'" 403 U.S. at 618 (quotation omitted). The importance of all teachers was reflected in the handbook's statement

that "'[r]eligious formation is not confined to formal courses [or] a single subject area.'" *Id.*[7]

The Court in *Catholic Bishop* found the teacher's role central enough that "the very process of inquiry" into the employment relationship created a serious risk of First Amendment violations. 440 U.S. at 502. These are the very concerns that lower courts have expressed in cases involving the employment of ministers. See *supra* pp. 26-27.

To determine whether teachers qualify as "ministers," courts should utilize presumptions that err on the side of church/state separation and reflect the deference discussed *supra*, pp. 29-31. Such presumptions include, among others: (a) courts should avoid where possible becoming entangled in fine distinctions between who is a "ministerial" teacher and who is not; (b) holding an ecclesiastical office or title indicates that the teacher has "ministerial" duties; (c) teaching a class in religion indicates that the teacher has "ministerial" duties; (d) integration of religion into the course or curricular materials (as

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[7] This Court's recent decisions have been more permissive than *Lemon v. Kurtzman* toward government aid programs benefiting religious schools. In *Mitchell v. Helms*, 530 U.S. 793 (2000), the justices casting deciding votes were more willing than *Lemon* had been to accept that religious school teachers would obey statutory restrictions on the use of state aid. *Id.* at 859-60 (O'Connor, J., concurring in the judgment). But the Court has never questioned the proposition that teachers in religious schools play crucial religious roles. (Some of these *amici* took opposite positions from each other in cases such as *Helms* on whether aid was permissible; but again, all *amici* agree here on the applicability of the ministerial exception.)

indicated by a school handbook or other evidence) indicates that the teacher has "ministerial" duties; (e) including a statement of faith among job requirements indicates that the teacher has "ministerial" duties; and (f) engaging students in religious observances such as chapel, prayer, and devotional Bible reading indicates that the teacher has ministerial duties. The presumptions should be rebuttable on a showing of clear and convincing evidence by the plaintiff either that she did not in fact have such responsibilities or that they were *de minimis* (for example, a janitor at a religious school who was asked once to lead students in a prayer over the intercom).

C. Courts Should Decide the Applicability of the Exception Early in the Litigation.

This Court should encourage early resolution in a lawsuit of questions concerning the applicability of the ministerial exception. Although the definition of "ministers" cannot be entirely bright-line, judges should hear the question on motions to dismiss, for judgment on the pleadings, or for early summary judgment.

As already noted, the ministerial exception aims to avoid subjecting religious organizations to the burdens of investigation and litigation. As such, the ministerial exception closely resembles doctrines of governmental or government-officer immunity, where this Court has adopted rules to prevent "excessive disruption of government and permit the resolution of

many insubstantial claims on summary judgment." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (qualified immunity for officials). The Court has sought to avoid "subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Id.* at 817-18; see *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation"); *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993) (value to the State of Eleventh Amendment immunity "for the most part lost as litigation proceeds past motion practice").

This Court should similarly encourage means for the full hearing of ministerial-exception claims before the religious organization must undergo extensive discovery or trial. Courts should consider limiting initial discovery to the question whether the plaintiff is a minister, setting up a summary judgment motion on the question. On summary judgment, the plaintiff's obligation to show evidence of a genuine issue of material fact should be heightened by the fact that the plaintiff has the burden to overcome presumptions of ministerial status by clear and convincing evidence. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-55 (1986) (holding, in First Amendment case, that because "the judge must view the evidence presented through the prism of the substantive evidentiary burden[,] . . . 'the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions'").

CONCLUSION

The ministerial exception is constitutionally required and valuable, but it does not rest on an assumption that religious institutions and employers never behave badly. Of course, they sometimes do. Its premise is not that churches are somehow "above the law." They are not. Its point is not "discrimination is fine, if churches do it." It is, instead, that there are some questions the civil courts do not have the power to answer, some wrongs that a constitutional commitment to church-state separation puts beyond the law's corrective reach, and some relationships — such as the one between a religious congregation and the teachers to whom it entrusts not only the "secular" education but also the religious formation of its children — that government should not presume to supervise.

To be sure, not every employee of a religious organization is "ministerial," and religious institutions — like all employers — have legal obligations to their employees. Although there are difficult questions to be asked and fine lines to be drawn, when it comes to interpreting the First Amendment's boundary between church and state, it cannot be the role of civil government to police the decisions of religious communities about who should be their leaders and teachers, any more than the civil courts should review disputes over the meaning of religious doctrines.

Respectfully submitted.

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JUNE 2011

AMICUS CURIAE BRIEF

No. 10-553

In the

Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF WALLBUILDERS, INC.,

in support of the *Petitioner*.

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INTEREST OF *AMICUS CURIAE*[1]

WallBuilders, Inc., is a non-profit organization that is dedicated to the restoration of the moral and religious foundation on which America was built. WallBuilders' President, David Barton, is a recognized authority on American history and on the role of religion in public life. As a result of his expertise in these areas, he works as a consultant to national history textbook publishers. He has been appointed by the State Boards of Education in states such as California and Texas to help write the American history and government standards for students in those states. Mr. Barton also consults with Governors and State Boards of Education in several states, and he has testified in numerous state legislatures on American history. Much of his knowledge is gained through WallBuilders' vast collection of rare, primary documents of American history, including more than 70,000 documents predating 1812.

Furthermore, WallBuilders encourages citizens all across America to continue the tradition of bringing religious perspectives to bear in public life. WallBuilders and its constituents desire to see

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[1] Petitioner and both Respondents have consented to the filing of this Brief. The letters of consent from Counsel for the Petitioner and both Respondents have been lodged with the Court. No counsel for any party has authored this Brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this Brief. No person or entity has made any monetary contribution to the preparation or submission of this Brief, other than the *Amicus Curiae*, its members, and its counsel.

religion treated as the Framers of the First Amendment intended and seeks to clarify what the religion clauses of the First Amendment really mean.

SUMMARY OF THE ARGUMENT

This Brief expands upon one argument raised in the Brief for the Petitioner Hosanna-Tabor (the "Church"), and one point raised in the Church's Petition for Writ of Certiorari. Specifically, this Brief describes the division within the federal courts of appeal as to whether the ministerial exception is grounded in the Free Exercise Clause only, or upon a combination of the Free Exercise and Establishment clauses. After noting that the overwhelming majority of the courts of appeals ground the exception in both the Free Exercise or the Establishment Clauses, the Brief surveys scholarship and historical documents to conclude that the strongest evidence exists that the ministerial exception is constitutionally required under both religion clauses of the First Amendment. This conclusion is bolstered by the prominence of the "two kingdoms" theory in the Founding era, a theory positing the existence of two jurisdictionally distinct sovereigns—one, a sovereign over earthly or temporal matters (*i.e.*, the civil government), the other, a sovereign over spiritual matters (*i.e.*, religious institutions).

Finally, as a result of the two kingdoms theory and the nature of the First Amendment religion clauses' jurisdictional limit, this Brief concludes by explaining that the jurisdictional limitation implies

the proper disposition of a ministerial exception case is for courts to dismiss the case at the earliest possible juncture because they simply lack power to adjudicate matters affecting the internal governance of religious institutions. Furthermore, the application of the exception should be broad and robust, in light of the history supporting the jurisdictional independence of religious institutions from the civil government.

ARGUMENT

I. FEDERAL COURTS LACK JURISDICTION OVER CASES INVOLVING THE INTERNAL AFFAIRS OF RELIGIOUS INSTITUTIONS BECAUSE THE RELIGION CLAUSES OF THE FIRST AMENDMENT CREATE A STRUCTURAL BARRIER TO SUCH JURISDICTION.

Although this Court has not ruled on a ministerial exception case, it should not be assumed that a lack of review from this Court indicates that the doctrine is somehow novel or without proper foundation in the Constitution. Rather, the ministerial exception is implicit within the First Amendment and fosters the type of religious self-governance the Founders intended. As set out more fully in the Church's Brief, (Br. of Pet'r at 15-37), the federal courts of appeals have correctly concluded that the Constitution requires judicial abstention in most disputes between religious institutions and their employees, despite the fact that the circuits do not fully agree on the precise origin of the exception in the Constitution. The majority of the lower courts

have correctly grounded the exception in the Free Exercise Clause and the Establishment Clause.[2] This grounding of the exception in the religion clauses of the First Amendment arises out of a prominent view at the Founding that religious institutions possessed a God-ordained authority, equal to the authority of the civil authority, to self-govern their internal affairs. This "two kingdoms" perspective (*i.e.*, the kingdom of the spirit and the kingdom of the temporal) created the basis for independent religious governance from the civil government. This independence implies that "civil courts are not . . . competent to adjudicate religious questions, and [consequently, they must] defer to religious tribunals on matters of religious law." Angela C. Carmella, *Responsible Freedom under the Religion Clauses: Exemptions, Legal Pluralism, & the Common Good*, 110 W. Va. L. Rev. 403, 413 (2007).[3]

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[2] As explained briefly below and as the Church argued in its Brief, at 33-37, the right to religious association may provide an additional basis for the exception. To the extent the ministerial exception is *also* grounded in those association protections, *see infra* at n.9, this additional grounding only strengthens the arguments set forth *infra* at 23-27.

[3] The institutional independence of religious institutions and the state are not the same as complete separation of everything religious from everything governmental—a notion not at all required by the Constitution. The Constitution, under the Establishment Clause, clearly permits governmental acknowledgment, accommodation, and encouragement of religion. *See* Steven W. Fitschen, *Religion in the Public Schools after* Santa Fe Independent School District v. Doe*: Time for a New Strategy*, 9 Wm. & Mary Bill of Rts. J. 433, 446-49 (2001).

Therefore, because the ministerial exception is one manifestation of the institutional independence of religious groups from civil government, cases implicating the exception should be dismissed at the earliest possible state. This is so because the dispute simply lies outside the bounds of the court's authority (*i.e.*, the dispute lies within a different "kingdom"), thereby preventing the court from considering the case. Thus, once a court finds that the case qualifies for application of the exception, its only option should be for that court to recognize its lack of power to rule and dismiss the case.

A. The Federal Courts of Appeal Have Grounded the Ministerial Exception, Variously, on Free Exercise and Establishment Clause Principles.

Although every court of appeals to have faced the question has recognized the ministerial exception,[4] the basis for recognizing the exception has varied slightly within the courts. In order to give this Court perspective on the lower court's holdings, your *Amicus* will first briefly outline the division below, followed by highlighting the significant similarities within the circuits.

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[4] The Federal Circuit has not ruled on whether the constitution requires application of the ministerial exception in cases involving the internal governance of religious institutions. As the Church pointed out in its Petition for Writ of Certiorari, however, the absence of ministerial exception cases is the result of the Federal Circuit's limited jurisdiction. (Pet. for Writ at 9.)

1. Nine courts of appeal have noted Free Exercise and Establishment Clause bases for application of the ministerial exception.

The Second, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits have noted that the ministerial exception is grounded on both Free Exercise and Establishment Clause principles of the First Amendment. *Rweyemamu v. Cote*, 520 F.3d 198, 208-09 (2d Cir. 2008); *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299, 306, n.7 (4th Cir. 2004); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006); *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360, 363 (8th Cir. 1991); *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1291 (9th Cir. 2010); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655 (10th Cir. 2002); *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1304 (11th Cir. 2000);[5] and *EEOC v. Catholic University*, 83 F.3d 455, 460-61, 465, 467 (D.C. 1996).

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[5] The Eleventh Circuit has recently reiterated the Free Exercise and Establishment Clause bases for the ministerial exception in an unpublished opinion in *McCants v. Alabama-West Florida Conf. of the United Methodist Church*, 372 Fed. App'x. 39, 42 (11th Cir. 2010).

2. *Three courts of appeal have grounded the ministerial exception on Free Exercise principles alone.*

The First, Third, and Fifth Circuits have recognized that if they were to interfere with the ministerial employment decisions of churches, they would violate the church's rights under the Free Exercise Clause. *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1578 (1st Cir. 1989); *Petruska v. Gannon Univ.*, 462 F.3d 294, 307 (3rd Cir. 2006); and *Combs v. Central Tex. Annual Conf. of the United Methodist Church*, 173 F.3d 343, 345 (5th Cir. 1999).

It is important here to note that, although these circuits have only explicitly grounded their understanding of the ministerial exception upon Free Exercise principles, none of these three circuits have *rejected* the Establishment Clause as an appropriate additional basis for the ministerial exception. *See, e.g., Petruska*, 462 F.3d at 310-11 ("Because we conclude that Petruska['s] . . . Title VII, civil conspiracy, and negligent retention and supervision claims are barred by the Free Exercise Clause, we need not address those claims further [under the Establishment Clause]."). Further, each has even included language in their reasoning sounding very much in *Establishment Clause* principles.

For example, the First Circuit explained that where a case involves a dispute over church "doctrine and practice," "judicial intervention comprises impermissible entanglement in the

church's affairs. *Natal*, 878 F.2d at 1577. *See also, Petruska*, 462 F.3d at 307 (explaining that decisions about who will perform "constitutionally protected spiritual functions" are "protected from governmental interference."); and *Combs*, 173 F.3d at 351 (invoking disestablishment principles in protecting "the constitutional mandate to preserve the separation of church and state").

* * *

Put simply, even where the circuits have appeared to lack complete unity over the grounding of the ministerial exception, the various courts' conclusion is uniform—namely, the First Amendment requires the ministerial exception. In other words, no circuit, once faced with the opportunity to apply the ministerial exception, has rejected its viability as a constitutional doctrine. Thus, as the Second Circuit noted, the ministerial exception does not simply express a prudential doctrine of "self-abnegation" because courts know they lack "'competen[ce] in . . . ecclesiastical law and religious faith.'" *Rweyemamu*, 520 F.3d at 205 (quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1872).) Rather, as will be argued below, the Constitution compels the courts' abstention because to do otherwise would breach a jurisdictional barrier between religious institutions and the civil government.

B. The Ministerial Exception Arises Implicitly, but also Necessarily, Out of the Free Exercise and Establishment Clauses of the First Amendment.

Justice Douglas was not engaging in hyperbole when he observed that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). The truth of the maxim can be observed in no clearer relief than in the religion clauses of the First Amendment. As will be described below, the circuit courts of appeal are correct to have interpreted the ministerial exception as a necessary implication arising from the Free Exercise and the Establishment Clauses of the First Amendment. Further, this constitutional imperative is not surprising in light of the nature of religion and the common view at the nation's Founding that the church and the state exist as two separate but equal sovereign institutions, each with its own exclusive jurisdiction over some matters.

In light of this reality, this Court has refused to impute any legislative "purpose[s] of action against religion . . . because this is a religious people." *Church of the Holy Trinity v. United States*, 143 U.S. 457, 465 (1892). Statements regarding religion in the Founding documents generally, and the language of the religion clauses of the First Amendment specifically, grant the free exercise and disestablishment of religion a position of paramount importance. These various statements speak a "universal language . . ., affirm[ing] and

reaffirm[ing] that this is a religious nation." *Id.* at 470.

Thus, the logical path connecting the right to robust protections for the internal governance of religious institutions (of which the ministerial exception is one) to the First Amendment religion clauses is actually quite simple. Church autonomy cases in general, and ministerial exception cases in particular, are those implicating the internal governance of religious institutions.[6] Such matters are within the "kingdom of the church," and are therefore outside of the "kingdom of the state." Understanding the ministerial exception under a "two kingdoms" approach logically leads to the conclusion that the exception applies to all lay employees.

However, should this Court disagree that the exception should stretch that far, it surely covers Respondent Perich, who was a "called teacher." As the Church set forth more fully in its brief, called teachers do "sacred" work because they "teach the faith in word and deed" and because they "perform part of the pastoral functions of the church." (Br. of Pet'r at 4.) Respondent Perich also needed to have her call "extended" to her by vote of a local congregation, at which time she was "installed [into the] office via the public rite of 'commissioning,' and [was then] recognized as a 'Minister of Religion, Commissioned.'" (Br. of Pet'r at 6.)

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[6] The Seventh Circuit has highlighted this point by opining that the ministerial exception is actually better termed the "internal affairs" doctrine. *Schleicher v. The Salvation Army*, 518 F.3d 472, 474 (7th Cir. 2008).

This jurisdictional division, derived from the two kingdoms theory, motivated the first Congress to codify a jurisdictional barrier in the First Amendment that protected the affirmative right of religious institutions to govern their affairs and protected the negative right to be free from state interference with those affairs. However, your *Amicus* hastens to add that the barrier is absolute only insofar as the matter in dispute is within the rightful authority of the religious institution. Religious institutions are subject to the civil government in matters properly within the civil realm, such as maintaining the public—as opposed to private—order.

Further, recognition of the jurisdictional division has pedigree in an early landmark opinion of this Court, which opinion acknowledges a practical reality arising out of jurisdictional questions. In *Marbury v. Madison*, 5 U.S. 137, 163 (1803), this Court noted the guiding principle that "all possible injuries whatsoever, that *did not fall within the exclusive cognizance* of either *the ecclesiastical*, military, or maritime tribunals, are for that very reason, within the cognizance of the common law courts of justice," thus recognizing the jurisdictional limitations of the civil court. (emphasis added). As far as the civil courts were concerned, ecclesiastical disputes clearly fell within that category of cases "com[ing] under the description of *damnum absque injuria*—a loss without an injury," *id.* at 164, because those injuries were subject to the courts of the church. This same

principle extends to all internal proceeding of a church, and not just its formal judicial proceedings.

Of course, as noted above, religious institutions are not *absolutely* immune from the civil courts' jurisdiction. As Thomas Jefferson urged in The Virginia Act for Establishing Religious Freedom, government should refrain from interfering in religious exercise *except when* "when [religious] principles break out into overt acts against peace and good order." *http://religiousfreedom.lib.virginia.edu/sacred/vaact.html*. Jefferson later reaffirmed his understanding of the nature of the jurisdictional divide when he noted in a letter to the Reverend Samuel Miller that "the government of the United States [is] interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises." 11 The Writings of Thomas Jefferson 428 (Albert Ellery Bergh, ed., 1905). Thus, religious institutions can come under the jurisdiction of the civil courts in some cases, but only when they act *ultra vires* of their proper sphere of authority.

1. ***Although the Founders held ideologically diverse views on the relationship between church and state, the First Amendment religion clauses arose because of the widely-held "two kingdoms" view that the church and state were sovereign over jurisdictionally separate spheres.***

As just noted, one of the animating forces behind the religion clauses of the First Amendment

was the recognition that any given sovereign operates within limited jurisdictional boundaries. These bounded areas of jurisdiction, often referred to as "two kingdoms," suggested a jurisdictional divide between civil and religious institutions and "rested on a jurisdictional notion that there is a realm of religious belief and experience beyond the power of government." Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. Pa. L. Rev. 1559, 1623 (1989). The "two kingdoms" idea can be found in papal teachings as early as the fifth century, and it persisted through the Reformation and remained a dominant view during our nation's founding. Michael W. McConnell, *Religion & Constitutional Rights: Why Is Religious Liberty the "First Freedom"?*, 21 Cardozo L. Rev. 1243, 1245-46 (2000); Robert J. Renaud & Lael D. Weinberger, *Spheres of Sovereignty: Church Autonomy Doctrine & the Theological Heritage of the Separation of Church & State*, 35 N. Ky. L. Rev. 67, 71-72 (2008).

For instance, St. Augustine recognized a "city of God" separate from a "city of man." *Id.* (alluding to a distinction made in Augustine's classic book, *City of God*). By the late fifth century, Pope Gelasius articulated "'two powers by which the world is chiefly ruled, the sacred power of the prelates and the royal power.'" *Id.* at 72 (quoting Arthur Hyman, *Philosphy of the Middle Ages*, 715 (1983)). Even during a season when papal supremacy was at its height, the "two kingdoms" concept endured, in that the "spiritual sword" was wielded "'*by* the church'" and the temporal or civil sword was wielded by the government "'*for* the church.'" *Id.* (quoting Jarislav

Pelikan, *The Christian Tradition*, 322 (1989) (emphasis added)).

During the 13th century, the Magna Carta became the embodiment of jurisdictional independence of the spiritual kingdom from the civil kingdom, while, contemporaneously, English jurist Henry de Bracton acknowledged that the developing common law courts were only competent to judge temporal, as opposed to spiritual, matters. *Id.* at 72-73. It was during this time that courts became increasingly clear in their reasoning that "'some wrongs were not within the jurisdiction of the civil government court.'" *Id.* at 73 (citation omitted). *Cf.*, *Marbury*, 5 U.S. at 164.

During the Reformation, Martin Luther and John Calvin both advocated jurisdictionally distinct realms of authority for the church and the state. *Id.* at 74-76. Calvin noted that "'Christ's spiritual kingdom and the civil jurisdiction are things completely distinct,'" *id.* at 75 (quoting John Calvin, *Institutes of the Christian Religion*, 4.20.1 (J.T. McNeill, ed., F.L. Battles, trans. 1993)), and Luther contemplated church and state as distinct institutional equals, *id.* at 76.

As the American colonial period commenced, the two kingdoms concept persisted in England and Scotland through the efforts of theologians Andrew Melville, Alexander Henderson, and George Gillespie, each arguing for the independence of the church from the control of the monarch. *Id.* at 77-79. It was in this spirit that the English Puritans, Pilgrims, and other separatists brought the two

kingdoms worldview to the American colonies, which worldview would have tremendous influence over the Founders when they drafted the early documents of the nation. *Id.* at 80-82.

By the time of the Founding, three ideologically diverse groups[7] arose on the scene, and each was motivated by somewhat different convictions. It was this diversity of views, however, that ultimately resulted in the principles enshrined in the religion clauses of the First Amendment.

At the more religious end of the continuum, "pietistic separationists" (usually dissenters from established churches) were gravely concerned about

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[7] One of the obvious difficulties in discerning what the Founders intended for any given constitutional precept is that their views and intentions were not monolithic. For instance, institutional independence of church and state was tremendously important to some, but not all, Founders. But this difficulty in discerning intent is not the same as impossibility. Because

> [a]ll three traditions contributed to the historical meaning of the religion clauses, . . . all three are therefore relevant for constitutional interpretation. Any attempt to reduce the Founders' views to one position or to read the beliefs of certain Founders, no matter how prominent, into the first amendment is likely to produce indefensible and culturally unacceptable results.

Adams & Emmerich, 137 U. Pa. L. Rev. at 1594. Although reducing the Founding views into these three camps is still an oversimplification of the actual diversity of views, the camps accurately reflect the major driving influences of the religion clauses and are, therefore, useful for the instant analysis.

the state dictating matters properly within the spiritual kingdom. Adams & Emmerich, 137 U. Pa. L. Rev. at 1622-23. This brand of separationists believed that "there is a realm of religious belief beyond the power of government," and that "state intrusion into this realm threaten[s] authentic faith . . . ." *Id.* at 1623. Further, disestablishment was necessary to "'keep the holy and pure religion of Jesus Christ from contamination by the slightest taint of earthly support.'" *Id.* at 1622 (quoting Roger Williams). Established churches patterned after those in England "threatened 'not only the purity but also the very life and being of religion.'" *Id.* (quoting Roger Williams). Put differently, the religious separationists had clear free exercise and disestablishment concerns with regard to church and state relations.

Further, because the religious separationists were dissenters, they had particular concern about the majority coercing the minority to violate their consciences. Adams & Emmerich, 137 U. Pa. L. Rev. at 1591-92. Pertinent here, if this case is decided on a narrow ministerial exception rather than a broad view of the ministerial exception as just one component of church autonomy, such a precedent would bode poorly for minority religions today. Such religions are often powerless to advocate for their own exemption in a matters concerning that institution's corporate conscience. However, a proper understanding of the constitutional grounding of church autonomy will protect minority religions.

At the other end of the continuum were more secular separationists who, although not "irreligious," were influenced by the Enlightenment thinkers and were suspicious of religious institutions corrupting government functions. *Id.* at 1583-84, 1618. These Enlightenment separationists included Thomas Jefferson, Thomas Paine, and to a certain extent, James Madison. *Id.* at 1583.

Thomas Paine, for instance, excoriated the "union of church and state as 'a sort of mule-animal, capable only of destroying, and not of breeding up.'" *Id.* at 1584 (quoting Thomas Paine). Madison, for his part, strongly advocated for "protecting the purity of both government and institutional religion," a feat best accomplished by encouraging a "multiplicity of [religious] sects" and by maintaining "'a perfect separation between ecclesiastical and civil matters.'" *Id.* at 1586-87 (quoting an 1822 letter from James Madison to Edward Livingston). Again, as with the religious separationists, the Enlightenment separationists had both free exercise and disestablishment concerns.

The third group, sometimes referred to as "political centrists," included Founders such as George Washington, John Adams, and Benjamin Franklin. *Id.* at 1588. These men did not espouse a separationists' mentality as the two previously-mentioned groups did; rather, they manifested great respect for religion and regarded it as "an essential source of personal and social morality." *Id.* at 1595. Further, they were united with the separationists in the view that "the republic could not survive without religion's moral influence." *Id.* Although the

political centrists appeared most concerned about free exercise, their rhetoric could not be termed "anti-disestablishment."

In light of the separationists' zeal for jurisdictional independence of the church and state, combined with the political centrists' respect for religion within public life, it is no surprise that "the two-kingdoms view of competing authorities is at the heart of our First Amendment." McConnell, 21 Cardozo L. Rev. at 1246. It is similarly no surprise, in light of the three groups' views discussed above, that the First Amendment ended up protecting the free exercise of religion and ensuring religious independence through required disestablishment, since the religion clauses represent the workable consensus of all three groups.

James Madison's Memorial and Remonstrance Against Religious Assessments reflects the same view:

> "It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society."

Id. (quoting James Madison, *Memorial & Remonstrance*).

Similarly, John Locke, the political philosopher who greatly influenced many of the Founders, "esteemed it above all things necessary to

distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other.'" *Id.* at 1248 (quoting John Locke, *Essay on Toleration*). In short, a dominant view at the Founding demanded that the "state should . . . confine itself to matters of worldly concern, to avoid invading the province of the spiritual sovereign." *Id.* at 1246. Thus, religious liberty was "defended not on the basis of the rights of the believer, but on the sovereignty of God over matters spiritual." *Id.*

By affirming the two kingdoms view, the Founders resolved the tension between church and state by acknowledging that the state's authority is limited by a greater sovereign—namely, God—who instituted dual sovereigns to govern, respectively, spiritual matters and civil matters. The Founders concluded that these two equal lesser sovereigns could exercise authority only within their proper jurisdictional boundaries, and the religion clauses created a structural framework for insulating the operations of religion from the operations of the civil government.

Further, "[c]hurches and other religious organizations are among the mediating structures in a culture, occupying the space between the individual and government . . . ." Carl H. Esbeck, *Tort Claims Against Churches*, 89 W.V. L. Rev. 1, 11 (1986). These mediating institutions "reflect upon, advocate, and teach ideas about the good life," and are vital to the existence of liberal government. McConnell, 21 Cardozo L. Rev. at 1256. In fact, liberal government "depends upon these private

institutions for the formation of good citizens." *Id.* Significantly, a government's attempt to control a mediating institution like a church spells the end of the very liberalism it attempts to perpetuate through its control. *Id.*

It is important to note that, by highlighting mediating institutions, your *Amicus* is not arguing that these help to directly explain the meaning of the First Amendment religion clauses. After all, "mediating institutions" as a term of art was not used in the Founding era. However, the institutions themselves existed, and the concept of mediating institutions is a modern progeny of the two kingdoms concept. Given the fact that the two kingdoms theory was enshrined in the First Amendment, modern-day political and legal commentators rightly evaluate rights due mediating institutions in light of the First Amendment religion clauses.

Further, many Protestants hold to a theory of diversity of obligation (similar to the mediating institution idea) known as sphere-sovereignty. Promoted by Dutch theologian and political leader Abraham Kuyper, sphere-sovereignty describes the interplay between the various sectors of life—the concept that each "sphere" (or sector) of life has its own distinct areas of authority or competence. David A. Skeel, Jr., *The Unbearable Lightness of Christian Legal Scholarship*, 57 Emory L.J. 1471, 1507-08 (2008). Sphere sovereignty posits that the "state's role is to restrain sin" by very limited means. *Id.* at 1508. Under sphere sovereignty theory, the state may only act to "(1) to compel mutual respect of boundary lines when the spheres clash; (2) to defend

individuals and weak ones against the abuse of power within a sphere; and (3) to ensure that each citizen helps to bear the personal and financial burdens necessary to maintain the unity of the state." *Id.*

Similar concerns can be seen as well in Catholic social teaching on the mediating institutions mentioned above. As Professor Kathleen Brady commented,

> [m]any scholars in recent years have emphasized the importance of religious groups and other voluntary associations for sustaining a well-functioning democratic order. Religious groups are among the "mediating structures" or institutions of "civil society" that stand between the individual and the state and transmit the values, skills, and attitudes necessary for self-government. As the source of moral values, they function as "seedbeds of civic virtue." As training grounds for the exercise of democratic skills and responsibilities, they are "schools for democracy."

Kathleen A. Brady, *Religious Organizations & Free Exercise: The Surprising Lessons of* Smith, 2004 B.Y.U.L. Rev. 1633, 1700-1701 (2004) (citations omitted).

Such a modern understanding of the importance of these institutions or "spheres" comports well with a historically supported

understanding of the purposes of the religion clauses of the First Amendment. As Professor Mary Ann Glendon explained concerning religious disestablishment, it is "reasonable to suppose that 'the people' were to be protected, not only in their solitary individual religious beliefs and practices, but in the associations and institutions where those beliefs and practices were generated, regenerated, nurtured, promoted, and transmitted." Mary Ann Glendon, *Structural Free Exercise*, 90 Mich. L. Rev. 477, 543 (1991) ("the people" being a reference to the use of the phrase in the First Amendment's Assembly Clause). Furthermore, these protections set forth in the Bill of Rights (including, obviously the religion clauses) are "structural," and they create a "charter of 'positive protection' for certain structures of civil society," most notably including religious organizations. *Id.* ("positive protection" being a phrase used by Justice Stewart in his concurring opinion in *Sherbert v. Verner*, 374 U.S. 398, 416 (1963).).

These positive protections are appropriate because the Founders understood that "certain intermediate associations—religious groups foremost among them—were designed in part to promote self-government by fostering participation in public life, protecting the seedbeds of civic virtue, and educating citizens about their rights and obligations." *Id.* at 544. In other words, individual free exercise "cannot be treated in isolation from the need of religious associations and their members for a protected sphere within which they can provide for the

definition, development, and transmission of their own beliefs and practices."[8] *Id.*

Thus, it is not difficult to see how the institutional independence of the religious sphere from the civil sphere implicates the doctrine of the ministerial exception. Matters properly within the jurisdiction of religious organizations (*i.e.* those matters implicating their internal governance) would be necessarily *outside of* the jurisdiction of the civil governments, including the civil courts. Therefore, the ministerial exception simply recognizes the court's "lack of power to regulate religious societies in areas within their exclusive province, a jurisdictional restraint that dates to America's disestablishment." Carl H. Esbeck, *Dissent & Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 B.Y.U.L. Rev. 1385, 1583-84 (2004).

2. *Because religion operates to bind the consciences of its adherents, the Founders properly protected collective consciences by way of the institutional independence of religious institutions from the state's authority.*

Religion, almost by definition, binds the conscience. Although one's being conscience-bound may sound quaint to some modern ears, consideration of matters of conscience would have

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[8] Although the quotation obviously implicates associational rights, as noted *infra*, n.9, the rights at issue still arise from the text of the Free Exercise and Establishment Clauses and institutional protections they provide.

been unremarkable to those who drafted and ratified the religion clauses of the First Amendment. "Liberty of conscience was invoked repeatedly by both Federalists and Antifederalists in the legislative history of the religion clauses," and most notably, it appeared in the context of both "establishment prohibition[s] and free exercise guarantee[s]." Adams & Emmerich, 137 U. Pa. L. Rev. at 1600. Groups as varied as the ultra-religious pietists and the comparatively non-religious "separationists" equated liberty of conscience with religious liberty and believed it to be an "inalienable right encompassing both belief and practice." *Id.* at 1599.[9]

Some saw the civil magistrate as having a "duty to remove legal obstructions to religious exercise and foster an environment conducive to the 'free and absolute permission of the *consciences* of all men, in what is merely spiritual.'" *Id.* at 1625 (quoting Roger Williams, *The Hireling Ministry None*

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[9] Some evidence exists that the religion clauses were meant primarily to protect corporate, as opposed to individual, rights, *see* McConnell, 21 Cardozo L. Rev. at 1246 (noting religious liberty was "defended not on the basis of the rights of the believer, but on the sovereignty of God over matters spiritual."); and Glendon, 90 Mich. L. Rev. at 543 ("it [is] reasonable to suppose that 'the people' were to be protected, not only in their solitary individual religious beliefs and practices, but in the associations and institutions where those beliefs and practices were generated, regenerated, nurtured, promoted, and transmitted."). However, it is sufficient for the purposes of this Brief to note that the individuals' collective consciences are what give expression to the institutional exercise and disestablishment of religion that the First Amendment protects.

of Christs (London 1652)) (emphasis added). Significantly, this concern for liberty of conscience carried weight different from that which comes from merely taking a side on other debatable matters. This is why those who argue that religion is just like other ideologies and undeserving of higher protections are wrong. As was noted in the Memorial and Remonstrance, the "duty of every man" is to pay "homage" to God, and the duty is "precedent both in order of time and degree of obligation." McConnell, 21 Cardozo L. Rev. at 1246. Such devotion has never been true of other ideologies generally. Therefore, the First Amendment stands for special treatment of religion, protestations to the contrary notwithstanding.

For the Christian, for instance, as Abraham Kuyper once remarked, "'Oh, no single piece of our mental world is to be hermetically sealed off from the rest, and there is not a square inch in the whole domain of our human existence over which Christ, who is Sovereign over all, does not cry: Mine!'" David A. Skeel, Jr., *The Unbearable Lightness of Christian Legal Scholarship*, 57 Emory L.J.1471, 1507 (2008) (quoting Kuyper). Religion places "uncompromising claims" upon adherents "concerning the nature and limited role of the state, and qualifications are placed [by religion] on the individual believer's allegiance to the state and its civic demands for compliance with public duties." Esbeck, 89 W.V. L. Rev. at 3. These demands further illustrate the drive for disestablishment. As Elisha Williams, a New Light Congregationalist noted

> "If Christ be the Lord of the conscience, the sole King in his own kingdom; then it will follow, that all such as in any manner or degree assume the power of directing and governing the consciences of men, are justly chargeable with invading his rightful dominion; He alone having the right they claim. Should the king of France take it into his head to prescribe laws to the subjects of the king of Great Britain; who would not say, it was an invasion of and insult offer'd to the British Legislature."

McConnell, 21 Cardozo L. Rev. at 1246 (quoting Elisha Williams).

Thus, a predictable tension exists between the state's accommodating conscience-bound citizens whose first allegiance is to God and His precepts while at the same time exercising its rightful duty to keep order. And the First Amendment religion clauses were intended to relieve just this tension. As noted above, the Free Exercise and Establishment Clauses operate to shield religious institutions from state interference, thereby allowing full expression of the collective conscience of the religious institution, free to govern its affairs apart from state entanglement.[10]

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[10] *See supra* n.9 (noting that individual rights of conscience are protected via the corporate protections contained within the religion clauses of the First Amendment).

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In summary, when one considers that the Founders 1) uniformly had a high view of religion and respect for the collective rights of conscience, and 2) overwhelmingly saw the institutions of government and church as jurisdictionally distinct, the necessary implication of the ministerial exception becomes clear. In fact, the religion clauses of the First Amendment make no coherent sense apart from an understanding of structural protection for religious institutions arising out of a theory of dual sovereignty. This dual sovereignty, rightly understood, logically mandates judicial abstention from cases implicating the internal governance of religious institutions.

Furthermore, because of the nature of this jurisdictional division, the ministerial exception, as a subset of the broader principle of church autonomy, is driven primarily by whether the dispute arises out of its internal governance and not primarily out of the particular duties an employee may perform. If the dispute is a matter of internal governance, then the civil must refrain from hearing the dispute. And here, where the Church dismissed the Respondent, who was extended a "sacred" call by the local congregation to be a "commissioned" minister, (Br. of Pet'r at 4, 6), a civil court should have nothing to say about that call being revoked.

C. Courts Lack Jurisdiction to Hear Ministerial Exceptions Cases Because the Constitution Bars the Civil Courts from Interfering with the Internal Affairs of Religious Institutions.

The purpose of laying out the overwhelming strength of the case for the ministerial exception as essential to religious liberty and institutional independence between governmental and religious authority is to assist this Court in guiding lower courts in resolving such cases. As the Church briefly described in its Petition for Writ of Certiorari, the various courts of appeals are split on how to dispose of cases implicating the exception. (Pet. for Writ at 33.) Your *Amicus* will set forth the three views the courts of appeal have articulated and conclude by demonstrating that the ministerial exception cases—and all church autonomy cases—ought to be dismissed at the earliest possible opportunity, with the court rightly noting its lack of power over the dispute, thereby obviating the need for expensive discovery or factfinding.

1. Courts of appeals have variously held that application of the ministerial exception dictates that the court should a) dismiss the case for lack of jurisdiction, b) dismiss the claim for failure to state a claim, or c) dismiss the case because the constitution bars employment discrimination claims for ministerial employees.

The circuits have approached disposing of ministerial exception cases in three basic ways.

First, five circuits, the Second, Fifth, Sixth, Seventh, and Eleventh, have held that courts lack jurisdiction over cases in which the ministerial exception applies, warranting dismissal under Rule 12(b)(1). *Rweyemamu*, 520 F.3d 198, 200-01, 210; *Combs*, 173 F.3d at 345, 350-1; *Hollins*, 474 F.3d at 225, 227; *Young v. N. Ill. Conf. of United Methodist Church*, 21 F.3d 184, 185, 188 (7th Cir. 1997); and *McCants*, 372 Fed. App'x. at 42.

Second, four other circuits, the First, Third, Ninth, and Tenth, have held that the ministerial exception warrants dismissal for failure to state a claim for which relief can be granted under Rule 12(b)(6). *Natal*, 878 F.2d at 1578; *Petruska*, 462 F.3d 299, n.1; *Werft*, 377 F.3d at 1100, 1104;[11] *Skrzypczak*

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[11] The Ninth Circuit has also recently affirmed dismissal of a ministerial exception case under 12(c) (judgment on the pleadings), the defendant having filed an answer to the plaintiff's complaint. *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 2006 U.S. Dist. LEXIS 92708, *4-5 (W.D. Wash. Dec. 21, 2006), aff'd *Alcazar*, 627 F.3d at 1291.

v. Roman Catholic Diocese, 611 F.3d 1238, 1242 (10th Cir. 2010). The Tenth Circuit converted the defendant-appellant's 12(b)(1) motion to a 12(b)(6) motion, holding that it properly had "power over the case," but that no claim could be sustained under the facts. *Id.*

Third, three other circuits, the Fourth, Eighth, and D.C., have held that the ministerial exception creates a constitutional bar to employment discrimination claims, reading an exception into the various employment statutes for religious institutions. *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169-71 (4th Cir. 1985); *Scharon*, 929 F.2d at 363; and *Minker v. Baltimore Annual Conference of the United Methodist Church*, 894 F.2d 1354, 1358-59 (D.C. Cir. 1990). Although, as noted above, the Fifth Circuit most recently has dismissed a ministerial exception case under 12(b)(1), *Combs*, 173 F.3d at 345, 350-1, that court appeared to implement a constitutional bar in *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972).

In laying out these three approaches, your *Amicus* has tracked the framework described by the Second Circuit. *Rweyemamu*, 520 F.3d at 206, n.4. Unfortunately, this framework can be confusing for several reasons. First, several circuits no longer fit in the category the *Rweyemamu* court placed them, and other circuits are now on record. For instance, as noted above, the Fifth Circuit has dismissed cases variously on constitutional bar grounds and lack of jurisdiction under 12(b)(1) grounds. Also, the Eleventh Circuit has been added to the 12(b)(1) lack

of subject matter jurisdiction category, and the Fourth, Eighth, and D.C. Circuits have been added to the constitutional bar category. Second, confusion arises because courts have appeared to use certain language imprecisely. *See, e.g.*, *Petruska*, 462 F.3d at 302 (dismissing for *failure to state a claim* because "*the First Amendment bars* Petruska's claims" (emphasis added)); *Rweyemamu*, 520 F.3d at 200-01, 209 (affirming the district court's dismissal for lack of subject matter jurisdiction while also noting that "the ministerial exception *bars* Father Justinian's Title VII claim." (emphasis added)); and *Combs*, 173 F.3d at 345, 351 (affirming the district court's dismissal for lack of subject matter jurisdiction while also opining that "we are persuaded that the First Amendment continues to give the church the right to select its ministers free from Title VII's restrictions.").

Further complicating matters, the Fourth, Eighth, and D.C. circuits have not explicitly rejected a 12(b)(1) or 12(b)(6) approach to dismissing a ministerial exception case; instead, they simply note that the constitution prevents the courts from ruling in such cases. *Rayburn*, 772 F.2d at 1171 ("we hold that the Constitution requires that civil authorities decline to review either the procedures for selection or the qualifications of those chosen or rejected here."); *Scharon*, 929 F.2d at 363 ("This is precisely the kind of judicial second-guessing of decision-making by religious organizations that the Free Exercise Clause forbids."); and *Minker*, 894 F.2d at 1359 ("We hold that the interpretation of the appointment and antidiscrimination provisions of the Book of Discipline is inherently an ecclesiastical

matter; it follows that this court lacks jurisdiction to hear Minker's contract claim.").

2. Because the church and state are jurisdictionally distinct sovereigns, the courts should dismiss ministerial exception cases for lack of jurisdiction.

As has been set forth in I.B above, constitutional jurisdictional independence prevents civil courts from interfering with the internal governance of religious institutions. Further, this jurisdictional independence serves to inform this Court what disposition is appropriate in a case against a religious institution and at what stage that disposition is appropriate—namely, swift dismissal of the case at the earliest possible stage for lack of jurisdiction. Practically speaking, it does not matter whether this Court views a court's lack of authority over the internal governance of a religious institution as a lack of *subject matter* jurisdiction or whether this Court recognizes the Constitution *bars* ministerial employees from bringing suit in employment matters. What is important, however, is for this Court to recognize the jurisdictional nature of its decision.

Put differently, because the issue of sovereignty lies at the heart of the ministerial exception cases, it becomes plain that in such cases the court simply lacks the power to rule. This lack of power lies not in the fact that the courts cannot decide employment matters generally (*i.e.* Article III power); instead, the power of internal governance

lies with the religious institution to manage its affairs.

Further, the consideration of the jurisdictional basis for the exception helps to illustrate why dismissal under 12(b)(6) provides insufficient protection to a religious institution. For instance, dismissal for failure to state a claim under 12(b)(6), although sometimes practically disposing of the case in a manner similar to dismissal under 12(b)(1), will also sometimes permit a ministerial exception case to continue inappropriately. Because dismissal under 12(b)(6) should ordinarily be without prejudice, a plaintiff would thereby have opportunity to re-plead and allege new facts after a 12(b)(6) dismissal. *See, e.g., Holley v. Crank*, 386 F.3d 1248, 1257 (9th Cir. 2004). Amendment is forbidden only when it is clear that such an amendment would be futile. *Id.*

Unless a court is clear on the jurisdictional barrier between it and the religious institutions, amendments could go on for several iterations until it is clear that no facts support the plaintiff's claims. If a plaintiff is permitted to plead new facts, the defendant church would then face the costly burden of defending those amended pleadings, possibly needing to respond to demands for discovery, to prevent inquiry into motives for the church's decision—all burdens the jurisdictional independence logically excludes from the civil sphere.

Significantly, when a court abstains from adjudicating a ministerial exception case, a court is

not yielding *its* authority to a different sovereign; rather it is *acknowledging* the authority already vested in the religious institution. The court is simultaneously acknowledging its own preexisting lack of authority.

And regardless of whether this Court dismisses for lack of subject matter jurisdiction under 12(b)(1) or for lack of jurisdiction under a more general constitutional affirmative defense, the key is to recognize why dismissal at the earliest stages of the litigation is so vital—namely, that religious institutions operate as a separate kingdom or sovereign, and it is no small matter for a court to interfere in the internal governance of that kingdom. And as the Church set out more fully in its Brief, at 16-19, the ministerial exception merits broad application to a wide variety of employees conducting a wide variety of duties.

Ultimately, this case is about whether the Constitution requires a broad and robust protection for the internal governance of religious institutions, and the clear answer to the question is a resounding "yes." Religious institutions are given heightened protection under the Constitution because the Founders recognized that society and government function best when the church operates independent from the civil government. Instead of agonizing over whether dismissal under 12(b)(1) or a constitutional bar is technically correct, this Court can appropriately resort to *Marbury* again. Federal courts simply may not take "cognizance" of "ecclesiastical matters," *Marbury*, 5 U.S. at 163, and the instant matter is an ecclesiastical one. The same

jurisdictional separation contemplated at our nation's Founding rightly continues today and rightly deserves the protection the Founders intended.

CONCLUSION

For the foregoing reasons and for other reasons stated in the Church's Brief, the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,
this 20th day of June, 2011,

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